Supreme Court of the United States,

OCTOBER TERM, 1878.

No. ~~334.~~ 61

GRAND TOWER MINING, MANUFACTURING AND TRANSPORTATION COMPANY,

PLAINTIFF IN ERROR,

VS

WALTER M. PHILLIPS and DAVID L. ST. JOHN,

DEFENDANTS IN ERROR

Abstract and Statement of the Case,

ASSIGNMENT OF ERRORS,

POINTS AND AUTHORITIES,

AND ARGUMENT OF

THOMAS G. ALLEN,

With whom

B. R. CURTIS

Is of Counsel, for *Plaintiff in Error.*

Levison & Blythe, Printers and Stationers, 217 and 219 Olive Street, St. Louis.

Supreme Court of the United States,

OCTOBER TERM, 1873.

No. 334.

GRAND TOWER MINING, MANUFACTURING AND TRANSPORTATION COMPANY,

PLAINTIFF IN ERROR,

vs.

WALTER M. PHILLIPS AND DAVID L. ST. JOHN, Partners as Phillips & St. John,

DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

ABSTRACT AND STATEMENT OF THE CASE.

This was an action of covenant, instituted by Phillips & St. John, against the Grand Tower Mining, Manufacturing and Transportation Company, in the Circuit Court of the Southern District of Illinois, of the January term, 1871, to recover damages for an alleged breach of covenants contained in an agreement, of which the following is a copy:

"THIS AGREEMENT, made this fifteenth day of December, in the year one thousand eight hundred and sixty-nine, by and between "THE GRAND TOWER MINING, MANUFACTURING AND TRANSPORTATION COMPANY," a corporation duly organized under the laws of the State of Illinois, party of the first part, and Walter M. Phillips, of New Orleans, in the State of Louisiana, and David L. St. John, of the city, county and State of New York, composing the firm of Phillips & St. John, parties of the second part—WITNESSETH as follows, that is to say:

First.—The party of the first part hereby agrees to sell and deliver to the said parties of the second part, from its coal dump at Grand Tower, on the Mississippi River, free, on board barges, or other vessels to be by them provided, as hereinafter set forth, one hundred and fifty thousand tons of screened, merchantable "lump" and "nut" coal, of the product of its mines in Jackson county, Illinois, yearly, during each of the years 1870, 1871 and 1872, in equal daily proportions as near as may be, between the fifteenth day of February and the fifteenth day of December in each of said years. The amount of "nut" coal to be thus delivered to bear the same proportion to the amount of "lump" coal delivered, that the amount of nut coal prepared for market by the said party of the first part bears to the whole amount of lump coal produced by them.

Second.—It is hereby mutually agreed and understood by and between the contracting parties hereto, that said parties of the second part shall have the sale of all coal produced from the mines aforesaid, that is or shall be sold and delivered at and below Cairo, Illinois; and it is also understood and hereby stipulated that said parties of the second part shall not sell or otherwise dispose of any coal to be delivered and used by any party or parties at any landing or place north of said city of Cairo.

Third.—The said party of the first part hereby agrees to lease to the said parties of the second part its steam tow boat "Grand Lake," and its fifteen barges, known as "Monitor barges," at the yearly rent or sum of seventeen and one-half per centum of their valuation, to be fixed as hereinafter specified, and also to lease to the said parties of the second part its square barges and its tug "Laurel," flats, tools, ropes, chains, etc., now at Memphis, Tennessee, at the yearly rent or sum of ten per centum of their valuation, to be made in manner hereinafter set forth; and the amount of said valuation on property leased at ten per cent. per annum, shall be due and shall be paid to the said party of the first part by the said parties of the second part, if said property shall be by them sold or shall be worn out or destroyed while in possession of said parties of the second part.

Fourth.—It is hereby mutually agreed that the valuations in the preceding paragraph mentioned, shall be made by mutual agreement, or in case of difference between the parties hereto, by referees, appointed as follows: Each party to choose one referee; the two thus chosen to choose a third; the award of any two to be final and binding on both parties to the contract.

Fifth.—The parties of the second part hereby agree to purchase, receive and pay for the coal hereinbefore agreed to be delivered at the rate and in the manner following, that is to say: During the year 1870, at the rate of three dollars per ton of 2000 pounds for "lump" coal, and one dollar and fifty cents per ton of 2000 pounds for "nut" coal, with a rebate of twenty-five cents per ton on every ton delivered, provided the said parties of the second part shall provide barges or other vessels for the receipt of said coal, as hereinafter agreed. Settlement for coal delivered and received, and for the rebate due thereon, and for the rent of the barges, steamboat, and other personal property leased by the party of the first part to the parties of the second part, shall be made monthly; and the balance due from the parties of the second part, paid in cash or by paper, acceptable to the party of the first part, payable to its order in the city of New York, without interest, four months from the first day of the months in which such settlement shall have been made.

During the years 1871 and 1872, the price of coal to be as above specified, with the following exceptions, namely: A statement shall be prepared by the party of the first part, showing the average price paid during the year 1869 by the said party of the first part, to its miners for mining coal; and hereafter, on the first days of January, 1871 and 1872, respectively, a similar statement shall be prepared for the years 1870 and 1871, and the average amount, if any, so paid per ton more than was paid in the year 1869, for mining, with fifty per cent. in addition thereto, shall be added during the years next succeeding, to the price per ton hereinbefore specified to be paid by the said parties of the second part. Said statement in regard to the cost of mining the coal to be made up by the said party of the first part from its books, and to be duly attested as correct by the affidavit of the General Agent of the said party, if such affidavit be required by the parties of the second part.

Sixth.—The said parties of the second part hereby agree to hire and rent from the said party of the first part, the property hereinbefore described, at the price and upon the conditions specified; and further agree, while said property is in their possession, to keep the same fully insured for the benefit of the party of the first part, the insurance to be so stated in the policies, and to make the ordinary and necessary repairs thereto.

Seventh.—The said parties of the second part further agree (provided the

navigation of the Mississippi is not obstructed by ice or low water,) to furnish and deliver to the party of the first part, barges or other suitable vessels sufficient to receive in equal daily proportions the coal aforesaid, which said barges or other vessels the said party of the first part hereby agrees to load without unnecessary delay; and it is hereby mutually agreed, that a delivery of barges or other vessels shall be deemed complete when the same are moored in good order alongside the river bank at Grand Tower, and the delivery of a cargo of coal shall be deemed complete when each barge or other vessel is loaded therewith. And further, that the party of the first part is to move the barges and other vessels to and from the dump, it being, however, expressly understood that the said barges or other vessels shall be at all times under the charge and control of their agents, to be appointed by the parties of the second part for that purpose; and that the party of the first part shall not be liable for any damages which may occur or happen to the same.

Eighth.—It is hereby mutually agreed that if the operations of the party of the first part are interrupted by accident to their railroad, floods at the mines, strikes of laborers or operatives or other unavoidable cause, the obligation of the said party of the first part to deliver coal under this agreement shall cease during such interruption; provided, however, that after deducting so much coal as may be needed by the party of the first part for its own use, the parties of the second part shall receive in 1870, during any such interruption, not less in any one month, than three-sevenths of any remainder of coal produced in such month; in 1871, not less than three-eighths, and in 1872 not less than one-fourth.

Ninth.—It is further mutually covenanted and agreed, that if for any other than the unavoidable causes hereinbefore mentioned, and through no fault of the parties of the second part, the party of the first part shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay to the parties of the second part, as liquidated damages, twenty-five cents for each and every ton which it may have so failed to deliver; or instead thereof, the parties of the second part may elect to receive all or any part of the coal so in default in the next succeeding month, in which case the quota which the party of the first part would otherwise have been bound to deliver under this contract, shall be increased in such succeeding month to the extent of the quantity in default. And further, if, through no fault of the parties of the second part, nor in consequence of the unavoidable causes hereinbefore mentioned, the party of the first part shall fail to deliver its monthly quota of coal as herein provided in regular daily quantities, the party of the first part

shall pay to the parties of the second part, as liquidated damages, fifty dollars for each and every day that either of the steam tow boats of the parties of the second part may be detained in consequence of such failure. And it is further mutually covenanted and agreed, that if the parties of the second part shall fail in any month to furnish barges or other suitable vessels to receive in regular daily quantities the quota which they are bound under this contract to receive, and if through such failure the party of the first part is prevented from delivering at least one-half of the monthly quota stipulated for herein, the parties of the second part shall for each and every ton less than one-half of said quota which through such fault of the parties of the second part, the party of the first part is unable to deliver, pay to the party of the first part the sum of twenty-five cents as liquidated damages. And it is further mutually covenanted and agreed that if the parties of the second part shall in any month fail to make payments for coal received and the use of barges and other property leased from the party of the first part, sold, worn out or destroyed, or fail to pay maturing obligations as provided for herein—the party of the first part shall be released from any obligation to make further deliveries of coal. And it is further mutually covenanted and agreed that, if either of the parties hereto, shall for the period of two consecutive months neglect to perform its engagements as herein set forth, the party not in default shall have the right to declare this contract null and void, and shall thereafter be released from all further obligations in the premises.

Tenth.—And it is further mutually agreed that, upon the expiration and termination of this contract, said property, belonging to said party of the first part, shall be by parties of the second part promptly returned in good order, ordinary wear and tear excepted, and delivered to said party of the first part at Grand Tower, Illinois, or in default of such return, said party of the first part shall have the right to enter upon, into, or otherwise, by its agents, to take possession of said personal property, or any part of it, wherever it may be, and recover from said parties of the second part, whatever damages may be incurred or lost to them by reason of the improper use or detention of said property, or any part thereof.

Eleventh.—It is further mutually understood and agreed to by the parties thereto, that in case the property herein stipulated to be leased by the party of the first part to the parties of the second part, at seventeen and one-half per centum per annum, as provided for in Article Third of this contract, shall be sold by the parties of the second part, or destroyed while in their possession, that out of the rental paid seven and one-half per centum per annum, of the valuation, with the interest thereon, shall be deemed and accounted as payment on account of such valuation.

Twelfth.—It is further mutually agreed that this contract shall have no binding force or effect until Walter M. Phillips, now of the firm of Phillips & St. John, party of the second part, shall have given to the party of the first part his note at six months from January 1st, 1870, for the sum with interest, now due and owing by said Phillips to said party of the first part, for coal purchased; and further, that if the said Phillips shall fail to pay said note at its maturity, then and in that case all obligation on the part of the party of the first part under this contract, to deliver coal, shall cease, and the said party shall have the right to declare this contract void.

GEO. TALBOT OLYPHANT, President,
[SEAL.] On behalf of the Grand Tower Mining, Manufacturing and Transportation Company.

PHILLIPS & ST. JOHN."

ORIGINAL DECLARATION.

Phillips & St. John, the plaintiffs, filed their declaration the 2d day of January, 1871. It contained but two counts. The following is the material substance of those two counts:

The first count alleges (Record, pp. 1 to 4 *) that the company agreed to deliver to plaintiffs from its coal dump at Grand Tower, &c., 150,000 tons of lump and nut coal yearly, during each of the years of 1870, 1871 and 1872, in equal daily proportions, &c., between the 15th day of February and the 15th day of December, in each of said years; that plaintiffs were to pay for the same, &c.; that upon the failure of the company to deliver to them any monthly quota of coal, to-wit, 15,000 tons of coal, plaintiffs might elect to receive 25 cents per ton of such monthly quota so not delivered, as liquidated damages; or might elect to receive all or any part of said monthly quota in the then next succeeding month; and that upon their election to take the monthly quota so in default in and during the next succeeding month, the monthly quota to be delivered in the next succeeding month should be increased in the next succeeding month to the extent of the quantity so in default. It also contains the averment that plaintiffs did provide barges, &c., and requested the delivery of the monthly quota in the month of October, 1870, and that the company,

*NOTE.—References, so made in this abstract, are to the pages of the *printed* transcript of the record.

though not excused by any of the contingencies provided for in the contract, did not deliver the same, and, therefore, plaintiffs elected to take the said quota for the said month of October, to-wit, 15,000 tons of coal in the then next succeeding month of November, and so notified the company; that plaintiffs procured barges, &c., sufficient to receive in equal daily proportions the said quotas for the said months of October and November, and kept the same ready, &c., during all the month of November, but that the company did not deliver any part of said quotas of said two months in said month of November. It contains the further averment, that according to the true intent of said contract, the said coal, so to be delivered to the plaintiffs, was to be sold at points at and below Cairo; and also that by means of the premises, plaintiffs have lost and been deprived of all benefit, profit and advantage which they might and would have acquired from the performance by said company, the defendant, of its covenant to deliver the said coal as aforesaid; and, furthermore, that after the said month of November, and before the commencement of the suit, plaintiffs could have sold the said coal, in the course of regular and legitimate trade, at a net profit of a large sum, to-wit, the sum of $9.00 per ton. It is averred, too, in said count that by reason of the alleged non-performance by the company of its covenant to deliver the said 30,000 tons of coal in the month of November, the plaintiffs were compelled to furnish and keep unused certain barges, and certain steam tow-boats and steam tugs, necessary to handle and tow the said barges, during all the said months of October and November; that the use of said barges and steam vessels would have been worth to the said plaintiffs, during the said months of October and November, a large sum per month, to-wit, the sum of $10,000 per month and that plaintiffs have sustained loss, to-wit, to the amount of $10,000 by reason of damage to said barges and vessels caused by leaving the same unused at Grand Tower during said months, which damage plaintiffs have been compelled by their covenants in said written contracts to repair and make good; and that they have been compelled to lay out and expend a large sum of money, to-wit, $5,000, in and about the watching and taking care of said barges and vessels while unused as aforesaid, &c.

The second count of the declaration (Record, pp. 4 to 9) sets out the aforesaid written agreement of the parties, avers a full compliance therewith on the part of Phillips & St. John, the plaintiffs, substantially as

is alleged in the first count. It alleges that the company did not deliver the October quota of coal in the year 1870; that plaintiffs elected to take said quota for the month of October in the next succeeding month and so notified the company; that by reason of the non-delivery of the coal, plaintiffs have lost and been deprived of all benefit, profit and advantage which they might and would have acquired from the performance by the company of its covenants to deliver coal; that after the said month of November and before the commencement of the suit, they could have sold the said coal so due and to be delivered to them by the company in said months of October and November, to-wit, 30,000 tons of coal, in the regular and legitimate course of trade, at and below the city of Cairo, Illinois, at a net profit of a large sum per ton, to-wit, the sum of $9 per ton; that by reason of the non-performance by the company of its covenants to deliver the said 30,000 tons of coal in the month of November, 1870, the plaintiffs were compelled to furnish and keep unused certain suitable barges and certain steam tow-boats and steam tugs necessary to handle and tow the said barges, during all of said months of October and November, 1870, the use of which would have been worth to plaintiffs, during said months a large sum per month, to-wit, the sum of $10,000 per month; that plaintiffs have sustained loss to a large amount, to-wit, $5,000, by reason of damage to said barges and vessels being kept at Grand Tower unused during said months of October and November, which damage the plaintiffs were required by their covenants in said agreement to repair and make good; and that plaintiffs have further been compelled to lay out a large sum of money, to-wit, $10,000, in the watching and taking care of said barges and vessels while unused, &c. It is further alleged in said count that each of said steam tow-boats has been detained by and in consequence of said failure to deliver coal a large number of days, to-wit, one hundred days each, and the liquidated damage which defendant in said agreement stipulated to pay plaintiffs amounts to a large sum of money, to-wit, $10,000, and that the company has not paid said liquidated damages nor any part thereof, &c.

The declaration has the usual form of conclusion in covenant, and claims damages in the sum of $200,000.

On the 16th day of January, 1871 (Record, p. 10), the Circuit Court overruled defendant's demurrer to that declaration and granted leave

to defendant to plead thereto; and on the 14th day of the following month the defendant filed five separate pleas to the whole declaration.

THE PLEAS.

The following is the substance of the *first* and *fourth* pleas:

The *first* plea avers (Record, p. 11) Phillips & St. John, plaintiffs, "did not furnish and deliver to the defendant, barges moored in good order alongside the river bank at Grand Tower suitable and sufficient to receive in equal daily proportions the said quotas of coal, as said plaintiffs in their declaration have alleged," &c.

The *fourth* plea (Record, p. 11) craves oyer of the sealed contract referred to and set out in the second count of the declaration, and says, as to each count thereof, *actio non*, because, &c., "that said plaintiffs and defendant after the making of said written contract, to-wit: on the 15th day of December, 1869, at Grand Tower, Illinois, in the district aforesaid, made and entered into a supplemental written and sealed contract and further agreement in duplicate parts (the date whereof is the day and year aforesaid), one of which parts of said supplemental contract is now here to the court shown, whereby it was stipulated and agreed that neither of said parties, the plaintiffs and defendant, who had entered into and become bound by said written contract in said declaration mentioned, should be excused for any failure, neglect or departure from the items of said first mentioned written contract on and after the first day of April, 1870." The plea then proceeds with the averment (Record, p. 12) as to what was stipulated in the first mentioned contract concerning the sale and delivery of coal, and as to the obligation thereby assumed by plaintiffs to receive said coal; that they, the plaintiffs, were so bound to furnish barges or other suitable vessels sufficient to receive said 150,000 tons of coal in equal daily proportions, in the year 1870, and were bound to receive of the defendant, a large amount of coal in each of the months of July, August and September of that year, to-wit: 15,000 tons in each of said months in equal daily proportions, and to furnish and deliver to defendant, barges and other suitable vessels to receive it in proportion as aforesaid, and that plaintiffs were further bound in and by the items and terms of said contract to pay to defendant 25 cents as liquidated damages, for each and every

ton of coal less than one half the number of tons they were so bound to receive in each and every month above named if, through the fault of plaintiffs, defendant (the company) should be prevented from delivering the same as aforesaid. And the plea further sets forth that it is "stipulated in and by said written contracts that if said plaintiffs should fail to pay their maturing obligations and indebtedness to defendant, due and owing by the terms and under the provisions contained therein, from the plaintiffs to defendant, that said defendant should then be released from any obligation to make further delivery of coal to said plaintiffs. The plea alleges that the navigation of the Mississippi river was not obstructed at any time during the aforesaid months of July, August and September in the year, 1870, and that the plaintiffs did not furnish and deliver to defendant barges or other suitable vessels sufficient to receive in equal daily proportions, the respective monthly quotas of coal they were so bound to receive in said respective months, and that through the fault of the plaintiffs in not so furnishing barges or other suitable vessels, the defendant was prevented in each of said months from so delivering to plaintiffs as aforesaid a large proportion of said coal, parts of said 150,000 tons, to-wit: 12,099 tons of coal in the month of July, 10,370 tons of coal in the month of August, and 13,947 tons of coal in the month of September, in said year; and the plea alleges that plaintiffs were at the time and during all the months of October and November in said year 1870, indebted to defendant in a large sum of money, to-wit, in the sum of $6,000, to-wit, at the district aforesaid, for and on account of liquidated damages due and owing from them to defendant by reason of plaintiffs' said fault in so preventing defendant from delivering as aforesaid, less than one-half of the said several respective monthly quotas and tons of coal plaintiffs were so bound to receive of and from the defendant in each of the respective months above named. And it concludes with an allegation to the effect that by reason of said plaintiffs' aforesaid indebtedness, &c., the defendant became and was released from any obligation, and was not bound to make deliveries of coal to plaintiffs in and during the months of October and November, 1870, &c.

No question arises in this court upon the demurrer sustained by the Circuit Court to the second, third and fifth pleas, and they are, therefore, left out of this abstract.

The *first* plea concludes to the country; and the *fourth* plea concludes with an offer of verification, and prays judgment, &c.

ADDITIONAL COUNTS.

Afterwards, on the 12th day of the following June, 1871 (Record, p. 14), on motion of their attorneys, plaintiffs obtained leave of the court "to amend their declaration," and the same day they filed "additional counts to their declaration." The following is the substance of the three additional counts:

1. The *first* of said counts (Record p. 14,) declares on the contract that is set out "in the second count of the plaintiffs' original declaration," and avers that plaintiffs provided barges, &c., suitable and sufficient to receive the monthly quota of coal during the month of October, 1870, to-wit, 15,000 tons, according to the terms of the contract, and alleges the refusal of the company to deliver it during that month; that the plaintiffs afterward, on the first day of November, 1870, elected to take said quota in the month of November then next following after said month of October, and then so notified the defendant; that plaintiffs kept barges, &c., ready to receive the said October quota of coal, and also the like quota for November, that defendant did not deliver to plaintiffs during said month of November, 1870, the said monthly quota of coal for said month of October, so carried over to the month of November aforesaid, nor any part thereof;" and it avers that defendant did not deliver "to the plaintiffs the quota of coal specified in said contract to be delivered to plaintiffs during said month of November, or any part thereof," but "wholly failed and refused to deliver to the plaintiffs during the month of November aforesaid, the said quotas of coal, to-wit, 30,000 tons, or any portion thereof at Grand Tower aforesaid."

Said count contains the further averment, "that defendant having failed to deliver the quotas of coal, as aforesaid, during the periods aforesaid, plaintiffs afterward, to-wit, on the 2d day of December, 1870, elected to take said 30,000 tons of coal during said month of December, to-wit, at any time during said month, up to and including the 15th day thereof, said last mentioned day being the last day for the delivery of the quota of coal for said month of December, according to

the tenor and effect of said agreement," and that defendant was by them then and there notified of their said election. Then follows the averment that plaintiffs, from and including the 1st to the 15th of December, 1870, had barges ready, &c., suitable and sufficient "to receive the quotas of coal, to-wit, 30,000 tons of coal aforesaid, and also the quantity of coal accruing during said period, to be delivered within said month of December, under the terms of said contract," and that they were then and there "during all of said period, ready and willing to receive all of said coal in equal daily proportions, and pay for the same according to the tenor of said agreement;" that defendant was not prevented, &c., and "did not deliver the said 30,000 tons so carried over from the month of November, as aforesaid, nor any part thereof, but to deliver the two quotas of 15,000 tons each, the defendant wholly neglected and refused," &c.

It is also alleged in said count that plaintiffs, "on and after the 15th day of December, A. D. 1870, and before the commencement of this suit, could have sold the said coal which defendant failed and refused to deliver as aforesaid, at a large net profit, to-wit, at a profit of $20 per ton, and that by reason of said failure and refusal, the plaintiffs were deprived of great gains and profits, which would otherwise have accrued to them," &c., and "were by the said default of defendant compelled to keep unused during all the time aforesaid, certain barges and certain steam tow-boats, and certain steam tugs, and hands to work and manage the same, and were also compelled to pay heavy charges, and incur large expenses, by reason of said boats and barges being unused during said period, and also in watching and guarding the same," by means of which, &c., the plaintiffs have sustained damages in a large sum, to-wit, the sum of $200,000.

2. The second of said additional counts (Record, p. 16) declares on the same contract mentioned in the preceding count; avers that plaintiffs provided suitable barges, &c., to receive the quota of coal for October, 1870, to-wit, 15,000 tons; the refusal of the defendant to deliver the coal in that month; the plaintiffs' election to take the quota of that month in the next succeeding month of November, and notice to defendant of their said election; the refusal of the defendant to "deliver the plaintiffs, during the said month of November, or at any time the 15,000

tons of coal or any part thereof so carried over from the month of October to the month of November aforesaid," and that by reason thereof the plaintiffs were prevented from realizing great gains and profits, which they might and could have made from the delivery of said coal;" and, furthermore, that from and after the last day of November, A. D. 1870, the plaintiffs could have made a net profit on said coal, had the same been delivered, of a large sum, to-wit, $20 per ton, and that they, the plaintiffs, were compelled to incur great expense in keeping barges and tow-boats, and men to manage the same, idle during said month of November, and were also compelled to pay out large sums by reason of said boats and barges being injured by remaining long unused," and that "by reason of the defaults of defendants in this count mentioned, they, the plaintiffs, have sustained damages in a large amount, to-wit, the sum of $200,000.

3. The third of the said additional counts declares on the contract referred to in the previous counts; avers that plaintiffs provided barges, &c., sufficient to receive the monthly quota of coal to be delivered during the month of November, 1870, to-wit, 15,000 tons; that they kept said barges moored, &c., all of said month; that defendant did not, nor would during said month of November, deliver to the plaintiffs the said monthly quota of coal, to be delivered during said month; and that plaintiffs afterwards, to-wit, on the 2d day of December, 1870, elected to take the said monthly quota of coal, to-wit, 15,000 tons in the said month of December, to-wit, on or before the 15th day of December, A. D. 1870; that defendant was notified of their said election; and that plaintiffs kept barges moored, &c., "suitable and sufficient to receive in equal daily proportions the said quota of coal, to-wit, 15,000 tons so carried over from said month of November to said month of December, and also suitable and sufficient to receive the like quota of coal for the said month of December, according to the tenor and effect of said written agreement." It avers the defendants were ready and willing to receive the coal, &c., and that defendant failed and refused to deliver it; and further, "that on and after the said 15th day of December, A. D. 1870, they, the said plaintiffs, could have sold all said quota of coal, for November, so carried over to December, as aforesaid, south of Cairo for a large net profit, to-wit, for a profit of $15 on each ton thereof,

but plaintiffs were deprived of all said profits by reason of the said failure and refusal of defendant so to deliver said coal," and also that "the plaintiffs were put to great expense by reason of being compelled to keep barges and transports idle for a long space of time, and to keep men employed to manage, take care of and watch the same, and to pay for repairs to said boats and barges occasioned by the same being so kept unused, and by reason of the said failure and refusal of the defendant, the plaintiffs sustained damages in a large sum, to-wit, the sum of $200,000."

On the following day (Record, p. 19), the 13th of June, 1871, counsel for defendant moved to strike said additional counts from the files, and the motion was overruled. And on the same day, on motion of the plaintiffs, defendant was ruled to plead to the additional counts of the declaration by the 22d day of that month. Afterward, on the day last mentioned, defendant, in obedience to the rule of court, filed three pleas to said additional counts to which a demurrer was afterward sustained; upon which pleas no question arises in this court.

DEMURRER.

Afterward, on the 26th day of June, 1871 (Record, p. 26), the plaintiffs filed a demurrer to the five pleas pleaded to the original declaration. The demurrer is in this form, to wit:

"And the said plaintiffs come and say the said pleas of the said defendant to the declaration herein filed are not sufficient in law, nor is any of them." And upon the same paper, *below* the name of plaintiffs' counsel there appears this, as follows: "*Special causes of demurrer:*

"2. The said second plea is uncertain and does not present an issue.

"3. Third plea is too general and uncertain.

"4. Fourth plea is double and uncertain.

"5. Fifth plea."

On the same day plaintiffs filed a separate demurrer in the same form to the three pleas pleaded to the three additional counts.

Defendant filed a separate joinder in issue to each of said demurrers (Record, pp. 26 and 27), and on the 28th day of the same month (Record, p, 27), "the court overruled the demurrer to defendant's first plea," and sustained the demurrer to the 2d, 3d, 4th and 5th pleas originally filed to the declaration, and also the demurrer to the three pleas filed to the additional counts of the declaration."

Afterwards, on the 6th day of the following month (Record, p. 28), on motion of plaintiffs, leave was granted to withdraw their first count to the amended declaration, and the cause was continued.

TRIAL AND VERDICT.

By agreement of the parties (Record p. 28), the cause was set for a hearing on the 5th day of February, 1872, and on that day a jury was empanneled and the trial begun, which resulted in a verdict (Record, p. 29) in the following form: "We the jury find the issue for the plaintiffs and assess their damages to the sum of two hundred thousand dollars."

Afterward, on the 2d day of March, 1872 (Record, p. 30), the court overruled defendant's motion for a new trial, and rendered a judgment upon the verdict in favor of the plaintiffs and against the defendant, for the amount of the verdict and the costs and charges of the suit.

The court signed and sealed a bill of exceptions (Record, p. 30), which contains all the evidence. The substance of so much thereof as is considered material to the proper determination of the questions involved in this record is as follows:

THE EVIDENCE.

David L. St. John, one of the plaintiffs, testified (Record, pp. 30 to 34) that the defendant has its office for business at Grand Tower, Jackson county, Illinois; that its coal mines are located at Mount Carbon in said county; that it has also an office for the transaction of business in New York; that Grand Tower is 80 miles above Cairo on the Mississippi river; that at the time of the contract referred to, the head quarters of plaintiffs for receiving coal was at Memphis; that they received it at Grand Tower and shipped it to Memphis. That from October the first to the middle of December, 1870, plaintiffs had in their possession for receiving coal at Grand Tower and transporting coal to Memphis, 35 or 38 square barges, about 15 monitor barges and quite a quantity of other barges; that monitor barges held from 700 to 750 tons; square barges about 450 tons; that the barges were towed by Mississippi river tow-boats. That they had two tow-boats, the "Comet" and steamer "Grand Lake" that they used for towing. That on the first of October there was at Grand Tower tonnage sufficient for over 2000

tons of coal; that there were 27 barges at Cairo, 14 at Memphis and some 10 or 12 at New Orleans, immediately under control of plaintiffs.

The defendant at the time this testimony was offered (Record, p. 34) objected to all of it in relation to the number of barges at Cairo, Memphis and New Orleans, and not at Grand Tower, as not relevant, and inadmissible under the issue joined. The court overruled the objection and admitted it in evidence, and the defendant then and there excepted.

The witness then testified that Capt. P. D. Pratt was the agent of the plaintiffs at Grand Tower, a place a little over 300 miles from Memphis; that it would take about three days for a fleet to be taken to Memphis, and four days for it to come back; that plaintiffs could unload a barge a day and perhaps more in a busy time; that it took about two days to tow barges down the river from Grand Tower to Cairo.

That in October, 1870, H. R. Driggs was commercial superintendent and George T. Olyphant was president of the company; that M. T. Bennett, the general superintendent had resigned on the 1st day of September, and Driggs was acting in October, November and December. Witness said he did not know of any demands for coal made by the agents of plaintiffs at Grand Tower after the 1st of October; that he had a conversation with the president of the company at New York on the 31st day of October in regard to the delivery of coal, and said to him, "I have come to see why we can't get this October coal;" that Mr. Olyphant said he had told Mr. Phillips because we had not paid our boat yard bills, to which witness replied that that was outside the contract, but could be arranged. That Mr. Olyphant said we must pay them, and witness said, if we pay will you give us coal? That Mr. Olyphant's reply was, "pay and then we will discuss that; you will know when your barges are loaded whether you are to get coal or not." That witness said to him next day, "we can't pay boat yard bills if you don't give our claims consideration." That Mr. O. said he would not discuss that matter; that witness asked him if he was aware their business was stopped; and asked him if he would not give them any coal till boat yard bills were paid, and he said, "no, not while I am president." That Mr. O. then said witness had deceived him in regard to the extension of Phillips' note. Witness said, I told him "we only asked mercantile extension," and Mr. O. said he thought we could pay it, and after some personal remarks he said "if you don't like what I have said

clear out." That witness then handed Mr. O. a letter demanding October quota to be delivered in November; that when Mr. O. received it he threw it down, and witness asked him if he would read it; and he said he would when he felt like it. That letter was written on the morning of November 1st, and Mr. O. refused to deliver coal and refused even to discuss the question.

Defendant objected at the time (Record p. 32) to all the foregoing testimony of and concerning the conversation and discussion by and between the witness and Mr. Olyphant, on the ground that it was irrelevant and did not tend to prove the issue in the pleadings, and the only issue on trial by the jury, to-wit, as to whether or not plaintiff had barges ready, &c., at Grand Tower at the time alleged in the declaration. The objection was overruled and the evidence was admitted on behalf of the plaintiffs, to which the defendant at the time excepted.

Witness testified that the letter last referred to was a notification that plaintiffs would take the October coal in November; that plaintiffs received no coal from defendant in November, and that they also notified defendant that they would receive November coal in December, and that they received none in December.

Counsel for plaintiffs questioned the witness (Record p. 32) as to what was the price of coal at Memphis and other places below Cairo during the months of October, November and December, in the year 1870; to which questioning the defendant, by counsel at the time objected, on the ground that by the contract read in evidence, the damage, in the event a breach thereof is proved against the defendant as is alleged in the declaration, is to be determined as is provided for in the contract and not otherwise, and that it is improper and inadmissible for plaintiffs to introduce any evidence as to the price of coal at Memphis or other places, or in relation to other matter not pertaining to the issue joined and the terms and conditions of the contract. The objection was overruled by the court, and the question was allowed and the evidence as stated below was admitted, to which defendant at the time excepted. The witness said, in reply to the last stated question, that the price of coal at Memphis, in October was about $7 a ton at the river, and $10 delivered in the city; that the first part of November it was $7 at the river and $11 in the city, and at the latter part of November the price was from $12.50 to $15.00 per ton; that the prices were for Pittsburg

coal; that Mount Carbon coal ruled about one dollar less; that it sold for a higher price in the city than to steamboats. He further said that plaintiffs could have supplied themselves with this coal only from the Grand Tower Company; that there was no other mine at Mount Carbon, and no point in the vicinity of Mount Carbon where they could have supplied themselves; that that quantity was not to be had at that time, that there was no means of getting coal from up the Ohio river, which was low, and the supply ran out; that there was no other mine near to the mouth of the Ohio river where that amount of coal could be supplied from. He further said (Record p. 33) that that river ceases in a measure to be navigable in seasons of drought, and whenever ice closes it, and that was the condition of it during the three months of October, November and December of that year; that plaintiffs had a coal depot at New Orleans, and that during October and November and to the middle of December, the average price of coal ruled at $9 at the river and $11 in the city, and afterwards it ruled as high as $16 at the river and $22 in the city; that those prices were for Pittsburg coal; Mount Carbon was one dollar less; and that it cost 33 cents per ton to ship coal to Memphis from Grand Tower, and 35 cents per ton to New Orleans.

This testimony as to the Ohio river, the price of coal at New Orleans and the cost of shipping coal from Grand Tower to New Orleans was all objected to by defendant at the time it was offered, for the same reasons given in support of the last mentioned previous objection. And defendant also at the time excepted to its admission.

On cross-examination, witness said his answer to the previous questions in regard to the barges, and in regard to the prices of coal, was derived from the regular reports plaintiffs had from their agents; was not at Grand Tower himself in October; that he saw, during the months referred to, 37 of plaintiffs' barges at Cairo; saw a number of them but did not count them; that he knew of his own knowledge the Ohio river was closed during the latter part of October by low water, for he saw it; that he did not know of anything in plaintiffs' contract with defendant in regard to transportation of coal on the Ohio river; said that at Memphis coal was sold in October to steamboats at $7 per ton; that he did not know the price of it at that time at Grand Tower, and all he knew about it was the prices at Memphis and below; did not know the amount nor the number of the sales; knew the current rates by being obliged

to keep posted; kept posted by reports of agents; that plaintiffs' river sales agent kept him posted; knew the price because he was told so; knew as to the prices below Memphis in the same way; don't recollect how much coal there was in the market at the time.

In reply to the question as to what was the reason of the advance in the price of coal at the time he had referred to (Record, p. 33), witness said it was the scarcity of coal; that he did not know of his own knowledge that any one sold coal at the prices stated. When asked if he knew what the price of coal was at Grand Tower at the same time, witness said he never made any effort to learn the price of coal at Grand Tower; that he wished to know the price below because that was where plaintiffs traded; that they did not trade at Grand Tower; that he saw no coal sold in New Orleans in October, and heard no reports of the price of coal elsewhere than at Memphis and New Orleans; that he presumed coal was sold at Grand Tower, but had no idea what price it sold for.

Witness said that in his interview with Mr. Olyphant at New York, he did not give as a reason for not delivering coal that plaintiffs had not barges to receive it; that Mr. Olyphant did say plaintiffs owed defendant the September penalty; that the penalties were not included in the monthly payments; that the bills for coal were included in the monthly settlements; that they were made up every month for what was due the preceding month; that Mr. Olyphant did insist that plaintiffs owed defendant for the September penalties, and that plaintiffs paid it under protest in November; the amount was $1594. Thinks the conversation when the penalty was claimed was at the interview he had with Mr. Olyphant. Witness also said that when he was at Grand Tower, in October, he heard the steamer "Grand Lake" was flying about; that he did not know the condition the "Comet" was in; she was lying up at Grand Tower; that the "Octavia" was doing all the work plaintiffs wanted done; said he demanded that the October quota should be delivered in the month of November, which would give plaintiffs 30,000 tons for November; that he only knew of the number of barges at Grand Tower, in November, from what he was informed.

On re-direct examination witness said Mr. Olyphant made no claim that plaintiffs had not barges to receive coal in October.

Walter M. Phillips, one of the plaintiffs in the case, testified (Record, p. 34) as to the number of barges under the control of the plaintiffs, substantially as the previous witness. That the number of barges was about fifty; that on the 11th of October, 1870, there were twelve barges at Grand Tower; that they remained there all through November and December; that plaintiffs got no coal there in those months, nor in December.

He was questioned as to the price of coal in Memphis in those months, and the question was objected to by defendant for the same reasons as to the similar question put to the previous witness. The question was allowed by the court, to which defendant as before, at the time, excepted.

His statement as to the price of coal at Memphis and New Orleans, and the cost of transportation of coal from Grand Tower was not materially different from what was stated by the previous witness. As to the price of coal at Cairo he said there was none but retail market for coal there; that a supply of coal such as plaintiffs' contract called for could not be had at Cairo; that the quantity of coal could not have been bought within 100 miles of Grand Tower at that time; that there were no other mines at Grand Tower but the mines of the defendant; and that defendant makes the only market there is there for coal. Said that the Ohio river was not navigable for coal boats during the three months mentioned, and during that time no boats (but three or four loaded very lightly) arrived at Memphis, owing to the low water; thinks the three or four referred to got there in December.

Witness said he went to see and had a conversation with Mr. Olyphant, at Grand Tower, on the 11th of October, and asked him why plaintiffs did not get coal, and he gave no satisfaction, and would not discuss it; that plaintiffs were running there then, and had barges there then; that Mr. Olyphant made no objection that the plaintiffs had no barges there, and wound up the conversation by saying, that when plaintiffs' barges were loaded they would know whether they were to have any coal or not; that plaintiffs' barges were there ready to receive it. Plaintiffs' counsel then asked witness (Record p. 35) whether or not they, plaintiffs, had been in business in New Orleans under a contract with defendant. The question was objected to by the defendant on the ground that it was irrelevant to the issue; the objection was overruled by the court,

and the question and answer admitted, to which the defendant at the time excepted. The witness answered that they had been in business in New Orleans under a contract with defendant.

On cross-examination (Record, p. 35), witness said that Mr. Olyphant did state plaintiffs had a remedy on the contract if they kept their contract; don't think he said plaintiffs had not kept their contract. Had never seen Mr. O. since that time. Witness further said that at that time the Ohio river was very low; that the Mississippi river was in quite a good stage of water; that the price of coal spoken of by him to steamboats was for quantities of 120 to 150 tons; that prices for city sales, were for sales of one to one hundred tons; that plaintiffs sold some Mount Carbon coal in October and some the early part of November; that the last sales made were at about $14 per ton; that there was very little coal in the market then in consequence of the low water in the Ohio river; that the rate then was higher than it was when the Ohio was at a good stage of water. He also said they did not sell some of the coal for nearly what they gave for it; that when the Ohio river was at its usual stage, the average rates were to steamboats $6 per ton; that in the spring plaintiffs sold considerable at $4.50, and some at $4.00 per ton that plaintiffs got at Grand Tower from the defendant. Said (Record, p. 36) that he did not know what coal was selling for at Grand Tower, when he was there in October, but his impression is that it was selling at $4.00 or $4.50 per ton; that he thinks defendant was selling coal to the Memphis Packet Company under a contract at $3.50 per ton for lump coal, and $1.50 or $2.00 for nut coal; that he is not positive, but thinks he had been told it was $2.25; don't know who told him; did not get the information from steamboatmen that they were getting nut coal for from $1.75 to $2.00.

Witness further said that there was none of the coal described in the contract below Memphis; that the high prices during the months referred to was partly owing to low water and short supplies; does not think the price of coal would have been so high if there had been a full supply in the market; does not know of any of the Grand Tower coal being sold by other parties below Cairo; said his knowledge of the price of coal at New Orleans was from current reports; does not know the regular rates for coal elsewhere than at Memphis and New Orleans, except some sales at Cottonwood Point; the price there was the same as at Memphis.

Said plaintiffs demanded in November their October quota of coal; the demand was no more specific than that; that in December they made demand for November quota to be delivered in December; thinks they demanded the quota for October and November in December; that the demand was made on the 2d day of December; knows there was 17 barges there in December; does not know it from having seen them; thinks the demand was no more specific than for the quota.

On re-direct examination witness said he had been acquainted with the Ohio river for three years; that there were many seasons of the year when it can not be navigated by coal-boats; that as a rule it is navigable for coal-boats, except a small time in the spring and fall.

P. D. Pratt testified on behalf of the plaintiffs (Record, p. 36), that he was their agent at Grand Tower in the management of barges and boats in the latter part of 1870; that plaintiffs had barges ready to receive coal of defendant at Grand Tower in October, and made repeated demands of Driggs, who acted as agent for the company, and who evaded answering, and made no objection to giving them coal because plaintiffs barges were not ready to receive it; nor did any other agent of the company. That Driggs had the sole control of the matter. Witness said plaintiffs barges remained at Grand Tower, ready to receive coal, until March; that the tow-boats were there too; that until the 20th or 21st day of December there were several men on the boats, and that the boats were taken across the river about that time to protect them from the ice; that the tow-boats were laid up idle about 48 or 50 days.

The witness said he had been acquainted with the Ohio river about 12 years; that it is invariably low in the summer and early Fall, and is subject to great falls and rises in the course of the year; has known it to be down to 24 inches; that coal can't be transported except when the river is high; that in October, November and December, 1870, no coal-boats came out of the river on account of the low water and the closing of the canal at Louisville; that the low stage of the river comes so regularly that it is calculated on in the coal business; that the cost of transporting coal from Grand Tower to Memphis is 30 cents per ton; and to New Orleans 50 cents per ton; that it might be less under favorable circumstances.

All the foregoing testimony in regard to the Ohio river and the cost

of transporting coal was objected to by the defendant (Record, p. 38), for the same reason as previously stated in regard to similar evidence; and the same was excepted to at the time of its admission.

On cross-examination, witness said that he knew the defendant was delivering coal to steamboats and to furnaces in St. Louis in October. Thinks defendant sold it to the Memphis Packet Company for $3.50, and nut coal for $2.50, and thinks as much coal was sold to other boats as to the Packet Company. Can't say they got $4.00 a ton for all they sold to boats; that defendant sold in November and December at about the same prices; that is according to the best of his knowledge. He further said that it was unusual for the Ohio river to be as low as it was that Fall for a long time; that there is generally what they call "coal-boat water" in the later part of October and 1st of November; that it is not usually low in November; that the Mississippi river at that time was about as it was usually.

J. W. Buckup, a witness for plaintiffs, testified (Record, pp. 39 and 40) as to the number of barges at Grand Tower, and the plaintiffs demand for coal, substantially as is shown by the evidence of the previous witnesses.

Hiram R. Driggs, sworn as a witness on behalf of plaintiffs, testified (Record, p. 40) that during the month of October, November and December, 1870, he was in the employ of the company, the defendant, as commercial superintendent, and that Mr. Olyphant, who was in New York, was the president of the company; that he, the witness, had charge of all the commercial business, and that his authority was in writing. Witness then produced a letter written by Mr. Olyphant, dated August 26th, 1870, addressed to the witness, in which he was instructed to take "the charge of the business relations of the company with all its customers" on the 1st of the month following, and by which letter he was informed it would be his "duty to endeavor to secure a sale of the coal and iron produced by the company and prompt payment therefor." The letter (Record, pp. 40 and 41) contains other instructions in regard to making up reports, &c. The letter was read in evidence. Witness said he commenced his duties under that letter about the first of September; that there was no coal delivered by the company

to Phillips & St. John during the month of October; that he did receive instructions from Mr. Olyphant in regard to delivering coal during that month and subsequent to that; that he never acted in regard to their contract particularly without instructions; that some of his instructions were verbal, and some in writing. Thinks Mr. Olyphant was there some time in October.

Plaintiffs' counsel then asked the witness (Record, p. 41) if he had a letter of Sept. 10th, with reference to the future delivery of coal. Witness replied "I have several letters;" and the court said, "if you have a letter of that date pass it over." Witness then handed two letters, one dated Sept. 9th and one of Sept. 10th, the last of which plaintiffs' counsel offered in evidence, to which defendant's counsel, after an examination of the letter, objected, on the ground that the letter contained nothing that was relevant, or that tended to prove the issue involved in the pending suit, and because the letter was not addressed or in any way directed to the plaintiffs by the defendant."

The court replied (Record, pp. 41 and 42), "that the letter had no application to the issue unless it relates to coal to be delivered in the months of October, November and December," and then said to counsel for plaintiffs, "you may read this letter to the jury; it has no application unless they believe from the reading of it that it has a subsequent bearing; of course anything prior to that has nothing to do with this case."

The letter, as follows, was then read to the jury on behalf of the plaintiffs:

"NEWPORT, *Sept.* 10, 1870.

MY DEAR SIR: After having had a conversation with Mr. Bennett last evening, I feel more than ever anxious to put an end to the contract with Phillips & St. John. One difficulty in the way is that they have possession of our river fleet. This, however, I suppose we could reach by a writ of replevin at any time when the vessels are within our grasp.

The other obstacle is in the fact that they will undoubtedly sue us for damages, if we decline to deliver them coal. This makes it important that we should, if possible, place them in the wrong before we take the decisive step. But we cannot afford to wait long, as they could hardly recover enough, in any event, to hurt us as much as we could be hurt by the waste of our river fleet and the embarrassment to our business which their action necessarily involves.

I think even now we could make strong defence on the ground of notice given us on the first and other failures. But, if they beat us, what damage could they show? Up to this time they have undoubtedly lost money, and I believe they would not, in any case, be allowed to claim for future profit. The measure of damages would be only the difference between the contract-price of our coal and what they might have to pay for other coal of equal quality.

I have written to Col. Allen on these points, and I wish you would consult him fully and carefully. If I am right, I would take prompt measures to get hold of our river property in their possession; then notify them of our purpose not to deliver any more coal to them. Having this in view, I would hold on to any barges loaded for them this month without coming to an actual rupture, and I would press the settlement of our joint account with them, allowing them, under protest, of course, in order to effect such settlement, more than you believe them entitled to. In other words, get all the money you can first; then get the river stock, and when that is accomplished, throw them overboard and let them sue. See Col. Allen at once, and read him this letter. Ask him whether their refusal to pay the general account against them does not justify, us in refusing to go on under the contract; also, how long we could fight them, if they should sue us for damage.—Yours, truly,

GEORGE TALBOT OLYPHANT."

H. R. DRIGGS.

To the foregoing ruling of the court thereon, and to the admission of the letter in evidence, the defendant at the time excepted.

The witness, Driggs, was then asked by counsel for plaintiffs (Record, p. 42), "Have you in your possession a letter of September 30th from Mr. Olyphant with further instructions with regard to this matter?" He answered "I have a great many letters." He was then asked to produce one of September 30th, and the witness then turned to the court and said, "I would ask the court if I am obliged to show these letters?" The court replied "I think so; any letters that have application to this proceeding." Witness then drew from his side pocket and handed to plaintiffs' counsel a roll of letters and said, "These are all the letters I have received from him except one or two strictly private." The court then said, "They only ask for letters from the president of the company to you as one of the employees with reference to the business.

Plaintiffs then offered in evidence (Record, p. 43) a letter dated Sept. 1st, 1870, to which, upon examination of the letter, defendant's coun-

sel objected, on the grounds that the letter contains nothing addressed to Phillips & St. John, and does not tend to prove or disprove the issue on trial between the plaintiffs and defendant, and that it is irrelevant and improper.

The court examined the letter and decided it should be read, stating at the time to the jury that they were not to regard anything but what relates to the delivery of coal in the months of October, November and December, 1870. The letter was then read in evidence and is as follows:

"NEWPORT, *Sept.* 1*st*, 1870.

MY DEAR SIR: We must put up the price of coal to transient customers at Grand Tower to 4½ per ton for lump and 2.80 for nut.

If you think this too much, more than the market will bear, telegraph me before making the change, but it seems to me reasonable. The increase at St. Louis will be at least as much as I have made.

Hurry up a settlement of some sort with Phillips & St. John, and deliver them no more coal without my orders. I want to get all I can out of them before the rupture.—Yours,

GEO. TALBOT OLYPHANT."

H. R. DRIGGS.

The defendant at the time excepted to the ruling of the court and to the admission of the letter in evidence.

Plaintiffs then offered in evidence (Record, p. 43) the two letters next hereinafter following, which letters were both objected to by the defendant upon the same grounds advanced in support of the objection to the last preceding letter.

The court examined the letter dated September 30th, 1870, and said in the hearing of the jury, "This does relate to coal in October and November," and then allowed the plaintiffs to read them; and both letters were then read in evidence. The following are the letters:

"NEWPORT, *Sept.* 30, 1870.

MY DEAR SIR: I have yours of the 9th instant. I note what you say about the advance of prices on the river, which I suggested. You may be right, but I do not believe we shall ever get any popularity with the St. Louis people or anybody else at the west. They might possibly like (?) us if we gave them coal for nothing. They buy coal of us as a necessity and on strictly

business principles. It is our best plan, I fancy, to act on business principles, too, and get all we can for our product. No one has any reason to complain because we sell to the Memphis Packet Company at a less price than others. It is a matter of contract. Had any other responsible line come to us for 200,000 tons we would have done as well by them. It is a rule all the world over to give large purchasers some advantages. You will recollect we put up our price last fall one dollar per ton without diminishing our sales at all. An advance must certainly be made on Belleville coal, and why not on ours? If there is any reason for our unpopularity on the river we should try and remedy it, but I do not believe it will make any difference whether we charge 4 or 5 dollars for coal. At the same time as I am to be at Grand Tower so soon you need not make any change until I see you.

Phillips & St. John's account you may leave, though I see little to be gained by delay. Contract or no contract, they will get no more coal from us. The court may award damages, but Phillips & St. John will have to encounter a large expense of time and trouble before they get them, and we had better pay the full amount every month rather than go on as at present.

I hope to be at Grand Tower this month.—Yours, truly,

GEO. TALBOT OLYPHANT."

H. R. DRIGGS.

"NEW YORK, *December 13th*, 1870.

MY DEAR SIR: I received yours of the 7th yesterday. I would simply advise Phillips & St. John with regard to their bill for steamboat detention in October that we place the amount, supposing it to be right, to their credit in account. Do the same with their bill for November when rendered.

Having consulted eminent counsel with regard to their construction of the second paragraph, and they having advised me that I am right, I telegraphed you yesterday to act under my advice of the second instant. You will, of course, be careful to stipulate that the coal delivered is for the party purchasing, and not to be resold. In the matter of the Phillips & St. John controversy, we have got our foot in, and it is idle now to be squeamish. If it had not been for Mr. Allen's opinion I would, on receiving Adsit's telegram, on Saturday, about the Grand Lake, have replied, telegraphing him to replevin the vessel. I think our policy is to run some hazard and take the bull by the horns. As it is, I have no doubt they will sell our property and hold the proceeds to pay the claims.

I have written to Allen, stating my view as to the extent of Phillips & St. John's claims upon us. Ask him to show you the letter. I think we owe them only 6,000 tons in all, and not as much as that. If what St. John says here

is true, that the river is now too low to move coal, I wish they or their agents could be induced to place such a statement in writing, or make it so as to be valuable in evidence. You of course understand that under our contract our obligation to deliver coal to Phillips & St. John is suspended between the 15th of December and the 15th of February.

I am sorry that the iron is reported so poor, but we must sell it for forge if not for foundry purposes. Sell it for some purpose or other, for the money we must have.

Say to Mr. Stevens that his remittance of the 11th, with the letter of the third, came to hand. Also say that we will continue subscription to the minister as heretofore.—Yours, truly,

GEO. TALBOT OLYPHANT."

H. R. DRIGGS.

Both letters were admitted (Record, p. 45) in evidence by the court on behalf of the plaintiffs, subject to the same qualification as was expressed by the court in regard to the admission of the previous letters.

To the ruling of the court, and the admission of the letters in evidence, the defendant at the time excepted.

The examination of the witness, Driggs, was continued, and in reply to questions by plaintiffs' counsel he said he did recollect of a demand made upon him for coal in the month of October; said they demanded coal; thinks the demand was made by Capt. Pratt; that Capt. Pratt did not get any coal for the reason that witness did not give it to him; that he supposes the coal could have been delivered; had no recollection of an objection that there were not barges enough to receive it; thinks there was a demand made in New York on the 1st of November; does not recollect whether the demand was made of him at that time; that no coal was delivered in November nor in December.

Counsel for plaintiffs said to witness (Record, p. 45), "State whether you recollect that an application was made for a small quantity of coal to get the "Grand Lake" out of danger or to moor her somewhere else?"

The question was objected to by defendant, on the ground that it involved an inquiry into a matter not in issue; that it had nothing to do with the contract between plaintiffs and defendant, and that it was otherwise irrelevant and improper. The court overruled the objection and then asked this question of the witness: "Did they refuse any

portion of the coal?" The witness answered, "I believe they did, sir; but I think they made the demand of some one else besides to me." The defendant, at the time, excepted to the question.

On cross-examination (Record, p. 46) the witness said he left the employ of the company the first of June, 1871; that he made up his mind he wanted to go, and resigned; that he was a witness in the case at the instance of Phillips & St. John.

To this question put to the witness, "Didn't you say the company did not treat you right, and you were bound 'to go' for them?" witness replied, "That that has nothing to do with the case."

The witness was asked by counsel for defendant (Record, p. 47) to state to the jury under what circumstances that correspondence from Mr. Olyphant was given, and about the difficulty with Phillips & St. John about the time those letters were written and previous to it. The witness' answer to this was, "Can't tell." He was then asked this question: "Don't you know that Phillips & St. John had been bothering the company?" Plaintiffs objected to the question as improper, and the court then said in the hearing of the jury, "The letters show the circumstances under which they were written sufficiently," and decided the question was improper. To that remark in regard to the letters, and the ruling of the court in regard to the question, the defendant at the time excepted.

Counsel for defendant then said to the court, "I wish to ask the witness if he knows why it was that Mr. Olyphant wrote that first September letter, what were the existing facts, the relations and understanding of the parties."

The court replied he may state the fact whether it was in answer to some communication he made.

The witness then, without any further question to him said, "I think he states in the letter that after that conversation with Mr. Bennett he concluded to do so and so." The court then asked, "Was it in answer to any letter you wrote?" Witness replied, "I think not; don't remember anything of the kind."

Witness further said, in reply to the question of defendant's counsel, that he understood the letter first offered in evidence had relation to sales of coal outside of existing contracts; that he had no authority to change existing contracts, or to make any variation in the price in those cases;

that under that authority he made sales during the months of October, November and December, at Grand Tower every day to the boats; could not tell the amount of sales in those months.

To the question "do you recollect the price that was paid for coal?" His answer was, "I think about $4; I think the price was not changed—$4 to outside boats—to the packet company $3.50; the prices were not changed at all during the year. That those prices were for lump coal; that nut coal sold from $2.25 to $2.75; either $2.00, or $2.25 or $2.75 to outside parties; that the proportion of nut coal was perhaps one-sixth of what was sold; that the average price of lump coal, during the months of November and December, was $3.75, and the average price of nut coal about $2.50 per ton; that the prices named prevailed during those three months.

Witness said (Record, p. 48) he did not have any authority over the other superintendents of the company except so far as the commercial business was concerned; that was new sales and the financial condition of the company; also old sales, seeing the money received and the coal delivered; that he had no charge of the purchases; that Mr. Pierce was the river superintendent and had charge of them.

On *re-direct* examination, witness said, there was no coal sold at Grand Tower other than the coal sold by the company, with which he was connected; and he said that when he received the letter instructing him to put the coal up to $4.50 he did not do it; that he did not change the price for the reason he thought it would not be policy; that he presumes he could have got more than $4 if he had thought it policy to put up the price. To the question, "was there any coal for sale?" witness said, "small quantities; I know coal was very scarce."

W. J. Wilmont, a witness for plaintiffs, testified (Record, p. 48) that he resides and does business in New Orleans, and did so in the year 1870; that his is the coal business. He was then asked by counsel for plaintiffs, "Have you any recollection of the price of coal there during the months of October, November and December of that year?"

To this question defendant objected, on the ground that it was improper to go into an inquiry or to introduce evidence as to the price of coal at New Orleans. To the objection the court replied, "There is evidently a difference of opinion as to the measure of damages, as to

whether the measure is the difference between the contract price and what coal was selling for at Grand Tower, or the price down the river without transportation. I will receive the evidence and control it by instructions;" to which remark of the court, in the hearing of the jury, and the decision of the court admitting the evidence which followed the question in regard to the price of coal, the defendant at the time excepted.

In answer to the foregoing question the witness said, the price of coal at New Orleans during those months was a dollar a barrel to the city trade for Pittsburg coal; that they sold altogether by the barrel; 180 lbs. to the barrel; that was the price during the month of October; that in November it was $1.25—$12.50 for 1800 lbs.; that 2000 lbs. is called a ton in New Orleans; that coal got as high as $2.00 a barrel towards the last of December; that the reason for that was the scarcity of coal; that there was no Pittsburg coal arriving then; the 9th of February was the first received; that some arrived a few days previous, but was not consigned to him; said he had been in the business since 1867. Was asked to state whether the coal market on the Mississippi is subject to fluctuation owing to variations in the stages of the Ohio river? and his answer was "Yes, sir; very much so." To the last question (Record, p. 49) and the answer thereto defendant objected, on the ground that the evidence sought was irrelevant to the issue and was in no way proper in the case. The objection was overruled and the evidence admitted, to which the defendant excepted.

Plaintiffs' counsel then asked the witness this question: Do business men make calculations with reference to these variations? The question was objected to by counsel for defendant, for the reason that it was irrelevant to the issue and because in this case the action is based on an alleged breach of written contract, by which, if the alleged breach is proved, the damages are to be determined as is therein expressly stipulated without regard to calculations of other parties in other contracts.

The court overruled the objection and allowed the question, and directed the witness to answer it; the answer was: "Yes, sir;" to which ruling and decision of the court in allowing the question and answer to go in evidence, the defendant at the time excepted.

Witness said that in the Fall of 1870, the dearth of coal down the Ohio river continued much longer than in other seasons; that is the

Ohio river remained low during the year; that they usually have a rise in November; but that season it failed he thinks until January. Said he knew nothing of the price of coal at Memphis only from hearsay. That as to the cost of transportation he has known coal to be brought from Louisville to New Orleans for 3 cents a bushel and from that to 4½ cents; that 25 bushels constitute a ton.

On cross-examination (Record p. 49) the witness testified that what he had said about sales of coal in New Orleans in October was his own sales; that he sold at the prices stated; that he presumes he had sold as high as 2,000 bushels a-day some days, at that price; that his were retail sales; was not able to say what was the highest amount sold to any one purchaser; that he sold 1,500 [illegible] one day; thinks it was in November but is not positive; could [illegible]ell how many tons he sold in October, in November, or in December; knows of sales of other coal dealers but not the dates of the sales or the quantity sold; that it was represented all of the sales were at the same price. In reply to the question "What were the usual rates of sales during those months, October, November and December, when there was a supply of the Pittsburg coal on hand?" The witness answered, it was lower; that if he recollected correctly they sold coal the entire season of 1870 at one dollar a barrel; that was their own sales of Pittsburg coal.

In reply to the question, if he knew how much coal there was in the New Orleans market during the month of October, 1870, and how it compared with what was in the market during the previous months; the witness said we calculate there is a boat load a-day that arrives in New Orleans, 8 or 9,000 bushels; that there was that much less of a supply in October than in the previous months; that in the month of Novemher the lessening in the usual quantity was about the same proportion; that that lessening in quantity was in consequence of the low stage of water; that when Pittsburg coal arrived the price was reduced, but not quite to the average standard; that in the city the market for coal went from 2 to 1 below what it was in November, and to the boats from $2.50 to 80 cents a barrel.

On re-direct examination (Record p. 50) the witness said there was not any difference in price between the quantity of 1,500 barrels and smaller quantities; that there could not have been as many as 15,000 tons purchased during the time referred to in New Orleans; that there was that much there but it was not sold by those in retail business.

On re-cross-examination (Record p. 50) defendants counsel asked the witness, "if there had been as much as that coming down in the month of October or November, whether it could easily have been sold." The answer was, "Yes, sir." This question was then asked, "If there had been twice that amount, or 30,000 tons, would the price have been what it was?" The answer was, "No, sir." Defendant's counsel then said, "So this price was regulated by the quantity in the market, and the high price was occasioned by the low water in the Ohio?" To which the witness replied, "Yes, sir."

On re-direct examination (Record p. 50) witness was asked by plaintiffs' counsel to explain, and he then said that when he stated the price of coal was one dollar a barrel in the city in 1870; he referred to the price of coal that portion of the year before the fall.

Chancey Tyler, a witness for plaintiffs, testified (Record p. 50) that he resides in New Orleans, and was in the coal business in that city in the Fall of 1870. Had been in that business eight years.

Plaintiffs' counsel then asked him this question, "Have you any recollection of the price at which coal ruled in the Fall of 1870 in that market?" Defendant's counsel objected to the question (Record p. 51) for the same reason as given in support of previous objections, to similar questions and the answers thereto, and the ruling of the court was the same, to which defendant at the time excepted.

The witness said that from October 1st, to November 18th, it sold at a dollar a barrel to the city trade; that from the 18th of November until the first day of December it sold at a dollar and a quarter; till January the first, a dollar and a half; that the high price continued all through the month of January and until about the 10th day of February; the market was then relieved by coal coming down the river—the rise in the river. Witness said in the month of December, on the 5th, he sold 400 barrels at $1.50 a barrel; that was the largest amount he sold, because coal was scarce; could not get it; could have sold more if he had had it.

On cross-examination (Record p. 51) in reply to the question, "What was the highest price of Pittsburg coal in that market when there was an average supply, no default in the market?" The witness said, "from 45 to 50 cents a barrel at retail;" that for a large quantity, say 15,000

tons, when there was no default in the market; the price varies every season; sometimes 45, 50, 70, 75, 80 cents, and sometimes lower than the lowest figures; has sold it as high as $1.60 a barrel, and it sometimes went down as low as 42½ cents; that he had known it to be sold as low as 42½, including transportation. Witness said the difference between the price of Pittsburg coal and Grand Tower coal is ten cents a barrel; by wholesale, 5 or 7 cents.

R. A. Speed, a witness for plaintiffs, said (Record, p. 51) he resided in Memphis, and was in the coal business there in 1870. He was asked if he had any memory of the ruling prices of coal in the Memphis market in the months of October, November and December of that year? Defendant objected to the question for the same reason as before given in support of objections to the other questions in regard to the price of coal at Memphis and at New Orleans; and an exception was then taken by defendant to the ruling of the court in admitting the question and answer thereto. Witness answered that in October the price was about $10 a ton to the city, and to the river about $6 or $7; that in November the prices changed; for about five days it sold at $11 a ton; then from that time to January it sold at $12.50 to $15; that was the price to the city to the 16th day of January. The price to the river was 8, 8½, 9 and 10 dollars a ton up to the 27th day of January, when other coal arrived there; that was Pittsburg coal; the difference between that and Grand Tower coal was a dollar a ton; the latter coal was a dollar less.

On cross-examination (Record, p. 52), the witness was asked: "Do you know whether there was any other coal in the market at Memphis besides Pittsburg coal?" His reply was, "A little sent down by the Packet Company;" that it sold for 85 cents—$8.50 a ton and for some of it they got 90 cents; that was in December; that company sent it down for their own use. It was not a usual thing to send coal down that way; it was in consequence of the high price; Pittsburg and Ohio river coal supplies that market.

Witness said those prices were occasioned by a scarcity of coal—the want of a supply and the Ohio river being so low. He then said coal hardly ever gets there at that time; that as soon as the Pittsburg coal got there the price went down.

On re-direct examination (Record, p. 52) witness said that Mount Carbon coal was one of the kinds supplied, and that had been so two years.

INSTRUCTIONS REFUSED.

When the evidence had closed (Record, p. 52) the defendant, by its counsel, prayed the court to instruct the jury as follows:

"1. The only questions which you are to inquire into and decide upon, under the evidence in this case, are these: (1) Whether or not the plaintiffs did have barges moored in good order at the river-bank at Grand Tower, suitable and sufficient to receive the coal stipulated for in the contract, in equal daily proportions during the respective months, as is alleged in plaintiffs' declaration. (2) And if, from the evidence, you find in the affirmative, upon that first question, then from the evidence, and the law applicable, as given by the court, you are to estimate and determine upon the amount of plaintiffs' damages. If you find, from the evidence, that the first question must be answered in the negative, that plaintiffs did not have barges moored in good order at the river-bank, at Grand Tower, suitable and sufficient to receive the daily quotas of coal during the respective months mentioned in the declaration, your verdict must be for the defendant.

2. In considering upon the questions and evidence in this case, you must disregard all the answers and statements which have been made by the several witnesses sworn and examined, and all written evidence which does not relate to, prove, or tend to prove, either affirmatively or negatively, the delivery of barges and the special damages as is alleged in the plaintiffs' declaration.

3. You are not to regard as evidence, for the purposes of this case, any statement made and sent or given by George T. Olyphant to the witness H. R. Driggs, declaring to him that Phillips & St. John should have no more coal, unless there is other evidence in the case which proves that the defendant in this suit, the Grand Tower Mining, Manufacturing and Transportation Company, authorized such statement or declaration, and that the said Driggs was authorized by the defendant to so state to Phillips & St. John, and that he, as the agent of the defendant, did make known that statement or declaration to the plaintiffs after he was so authorized by the defendant.

4. The law will not admit it to be presumed that a valid contract entered into by a corporation and sanctioned by the corporate seal of the corporation is or has been disregarded or broken by the corporation, because of a verbal or written declaration made by an officer of the same corporation to the effect that he or the corporation intends to disregard the provisions and stipulations contained in the contract so authorized and binding upon the corporation.

5. If in this case you are satisfied the contract in evidence has been broken by the corporation, the defendant in this suit, as is alleged in the plaintiffs' declaration, the damages must be assessed and the amount due plaintiffs determined upon, in conformity with the provisions and conditions stipulated and set forth in the contract."

The court refused to instruct the jury upon the foregoing points, as asked by counsel for defendant; to which opinion and decision of the court in refusing to instruct the jury as prayed the defendant, by its counsel, at the time of said refusal, then and there excepted.

INSTRUCTIONS GIVEN.

The court, of its own motion (Record, p. 53), charged the jury as follows:

"By the terms of the contract the defendant was to furnish and deliver to plaintiffs, on board of suitable vessels, at Grand Tower, on the Mississippi River, 15,000 tons of lump and nut coal, the product of its mines in Jackson County, Illinois, during each of the months of October and November, 1870, in equal daily proportions, as near as might be. The amount of nut coal to bear the same proportion to the amount of lump coal that the amount of nut coal prepared for market by the defendant bears to the whole amount of lump coal produced from its mines. The price of the coal to be at the rate of three dollars per ton for lump coal, and one dollar and fifty cents per ton for nut coal. The plaintiffs to furnish and deliver to defendant suitable vessels, sufficient to receive the coal in equal daily proportions during said months. Should the defendant fail to deliver the quotas of coal for either of said months, the plaintiffs might elect to have that quota delivered during the ensuing month.

The contract further provided, that the plaintiffs should have the sale of all coal produced from the defendant's mines for sale and delivery at and below Cairo, and that plaintiffs should not sell any of the coal to be used at any place north of Cairo.

The contract also provided, in case of the failure to deliver the monthly quota, in regular daily proportions, the defendant should pay plaintiffs, as liquidated damages, fifty dollars for each day that either of their tow-boats should be detained in consequence of such failure.

The plaintiffs allege that they were ready, at Grand Tower, during the month of October, 1870, with suitable vessels, to receive, in equal daily proportions, 15,000 tons of coal, but that defendant failed to deliver it; that plaintiffs

thereupon elected to have the quota of coal for October delivered during the ensuing month of November, and notified defendant of such election, and were ready at Grand Tower, during the month of November, with suitable vessels, to receive, in equal daily proportions, the October quota of coal, but the defendant failed to deliver the same.

The plaintiffs make the same allegations as to their readiness to receive the November quota of coal, the failure of the defendant to deliver the same, the election of plaintiffs to have that quota of coal delivered during the ensuing month of December, and notice to defendant of such election, their readiness and ability during the month of December to receive the November quota of coal, and the failure of defendant to deliver the same.

The plaintiffs also allege, that their tow-boats were detained at Grand Tower during the months of October, November and December, 1870, in consequence of defendant's failure to deliver the coal.

The defendant only puts in issue the plaintiffs allegation of their readiness and ability to receive, in daily proportions, the October and November quotas of coal.

The failure of defendant to deliver the coal, the election of plaintiffs to have the October quota of coal delivered during the ensuing month, and notice thereof to defendant, and the election of plaintiffs to have the November quota of coal delivered during the ensuing month, and notice thereof to defendant, are admitted by the pleadings.

If the jury believe, from the evidence, that the plaintiffs, during the month of October, 1870, at Grand Tower, were ready, with suitable and sufficient vessels, to receive, in equal daily proportions, the quota of coal for that month; and that they were also ready, at Grand Tower, with suitable and sufficient vessels during the month of November, 1870, to receive, in equal daily proportions, the quota of coal for the preceding month, then the plaintiffs are entitled to recover; and the true measure of damages is the cash value during November, 1870, of the kind of coal mentioned in the contract, at Cairo, or points below it on the Mississippi River, after deducting the contract price of the coal and the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation.

If the jury come to the same conclusion respecting the November quota of coal, then the measure of damages as to the failure to deliver that quota of coal will be the cash value of the kind of coal mentioned in the contract, in December, 1870, at Cairo, or points south of it, on the Mississippi River, after deducting therefrom the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation.

If the jury believe, from the evidence, that the plaintiffs tow-boats, without

any fault on their part, were detained at Grand Tower, during the months of October, November and December, 1870, in consequence of the failure of defendant to deliver coal under the contract during those months, then the plaintiffs are entitled to recover at the rate of fifty dollars for each day that either of their tow-boats was so detained."

Thereupon the defendant, by its counsel, at the time the charge was so given by the court (Record, pp. 54–55), excepted to the whole of said charge as being an improper and misleading direction and instruction to the jury.

And said counsel also, at the time as aforesaid, excepted then and there, specifically, to so much of said charge as instructed the jury that the contract provided, "that the plaintiffs should have the sale of all coal produced from the defendant's mines for sale and delivery at and below Cairo;" when, in fact, the contract provides that the plaintiffs "shall have the sale of all coal produced from the mines aforesaid, that is or shall be sold and delivered at and below Cairo," and when in fact there was no evidence whatever before the jury that there was any of said coal sold and delivered at and below Cairo, by the defendant, or by any person or persons other than the plaintiffs, and no evidence before the jury that the plaintiffs had sold, or agreed to deliver, at or below Cairo, any part of the coal claimed and designated in the plaintiffs' declaration as the quota of coal for the months of October, November or December, in the year 1870.

And counsel for defendant at the time, as aforesaid, also excepted, specifically, to so much of said charge as ruled and instructed the jury that the true measure of damages for the quota of coal for October, 1870, was the cash value during the month of November of that year, of the kind of coal mentioned in the contract, at Cairo, or points below it on the Mississippi River, after deducting the contract price of the coal and the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation; whereas the contract fixed the rule of damages, and the charge in respect thereto, should have conformed to that rule.

And the defendant, by its counsel, also excepted at the time, specifically, to so much of said charge as ruled and instructed the jury that the measure of damages, as to the failure to deliver the November quota

of coal, "will be the cash value of the kind of coal mentioned in the contract in December, 1870, at Cairo, or points south of it on the Mississippi River, after deducting therefrom the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation;" whereas the contract fixed the measure of damages, and the charge to the jury should have conformed to that rule, as is expressed in the contract.

And the counsel for the defendant, at the time, as aforesaid, furthermore excepted, specifically, to that part of said charge and ruling of the court which instructed the jury that if they believed, from the evidence, "that plaintiffs' tow-boats, without any fault on their part, were detained at Grand Tower, during the months of October, November and December, 1870, in consequence of the failure of defendant to deliver coal under the contract during those months, then the plaintiffs are entitled to recover the rate of fifty dollars for each day that either of their tow-boats was so detained;" for such instruction improperly gave the jury to understand that plaintiffs had made a proper claim for such specific liquidate damages; whereas the declaration contains no sufficient count to entitle plaintiffs to a recovery of such damages.

The bill of exceptions was then signed and sealed by the judge (Record, p. 55), wherein appears all the evidence, of which the foregoing is an abstract.

WRIT OF ERROR.

The writ of error, in this case, was issued, and service of citation accepted (Record, pp. 57–58) on the 8th day of March, 1872.

ERRORS ASSIGNED.

The Grand Tower Mining, Manufacturing and Transportation Company, the plaintiff in error, by its attorney and counsel, now alleges and assigns, the following separate and specific errors, which appear in the foregoing proceedings and rulings of the Circuit Court:

1. The court erred in not extending the demurrer (Record, p. 26) to the pleas to plaintiffs' original declaration, back to the respective counts of said declaration (Record, pp. 1 to 9); and it also erred in not extending the separate demurrer filed at the same time, to defend-

ant's pleas to the three additional counts of the declaration (Record, pp. 14 to 19) back to those respective additional counts.

2. The court erred in its decision made at the June term, 1871 (Record, p. 27), sustaining the plaintiffs' demurrer to the defendant's 4th plea (Record, pp. 11 to 13) to the plaintiffs' declaration.

3. The court erred in the trial of the cause, in admitting the testimony of David L. St. John (Record, p. 31) as to the number of barges under the control of plaintiffs at Cairo, Memphis, New Orleans and other places away from Cairo, objected to by the defendant as irrelevant to the issue; and it also erred in admitting as evidence the statement of said witness of his conversation and discussion (Record, p. 31), in New York, with Mr. Olyphant, the president of the company; which evidence was objected to by the defendant, at the time (Record, p. 32), on the ground that it was irrelevant and did not relate to or tend to prove the issue in the pleadings and the only issue on trial by the jury, to-wit, whether or not plaintiffs had barges ready at Grand Tower at the time alleged in the declaration.

4. The court erred in admitting in evidence for plaintiffs, the answer to the question put by plaintiffs' counsel to Walter M. Phillips (Record, p. 35), "Whether or not plaintiffs had been in business in New Orleans under a contract with defendant;" which answer was in the affirmative—the question and answer thereto being objected to at the time by defendant as irrelevant to the issue.

5. The court erred in each one of its separate rulings, in the trial of the cause, in respect to admitting in evidence, on behalf of the plaintiffs, the several letters (Re cord, pp. 42, 43, 44), dated respectively, September 10th, September 1st, September 30th, and December 13th, 1870, written by George T. Olyphant and addressed to H. R. Driggs,—which several letters were respectively objected to at the time, by the defendant, on the ground (Record, p. 41) that said letters contained nothing that was relevant or that tended to prove the issue involved in the pending suit on trial, and because said letters were not addressed to or in any way directed to the plaintiffs by the defendant.

6. The court erred in overruling the defendant's objection to this question put to the witness H. R. Driggs by counsel for plaintiffs (Record, p. 45), to-wit: "State whether you recollect that an application was made for a small quantity of coal to get the Grand Lake out of danger or to move her somewhere?"—the objection thereto being based on the ground that it involved an inquiry into a matter not in issue; that it had nothing to do with the contract between plaintiffs and defendant, and that it was otherwise improper.

7. The court erred in the statement made in the hearing of the jury and in the ruling thereon, after the defendant's counsel had asked the witness H. R. Driggs (Record, p. 47) on cross-examination, to "state to the jury under what circumstances that correspondence from Mr. Olyphant was given, and about the difficulty with Phillips & St. John about the time those letters were written and previous to it"—to which the witness replied, "Can't tell"—and which was then followed by this question, to-wit: "Don't you know that Phillips & St. John had been bothering the company?" Which question being objected to by counsel for plaintiffs, the court said, "The letters show the circumstances under which they were written, sufficiently," and decided the question was improper, and thereby the defendant was debarred of the answer as evidence,—to which statement and ruling of the court the defendant at the time excepted.

8. The court erred in overruling defendant's objection to the question (Record, p. 49) asked of the witness W. J. Wilmont, by counsel for plaintiffs, "Whether the coal market on the Mississippi is subject to fluctuation owing to variations in the stages of the Ohio river?" and in admitting the answer thereto, to-wit, "Yes, sir; very much so," to go in evidence; the question and answer being objected to at the time by the defendant, on the ground that the evidence was irrelevant to the issue, and otherwise improper.

9. The court erred in allowing plaintiffs' counsel to ask the witness Wilmont this question, to-wit (Record, p. 49), "Do business men make calculations with reference to these variations?"—to which question the witness replied, "Yes, sir"—and in permitting said question and answer to go in evidence for the plaintiffs; all of which was objected to

at the time by the defendant, for the reason the question is irrelevant to the issue, and because in this case the action is based on an alleged breach of a written contract by which if the alleged breach is proved, the damages are to be determined as is therein expressly stipulated, without regard to the calculations of other parties in other contracts.

10. The court erred, in each instance, in each of its separate rulings allowing the questions, objected to by defendant (Record, pp. 32, 34, 38, 48, 51), put by plaintiffs' counsel to the several witnesses, David L. St. John, Walter M. Phillips, P. D. Pratt, W. J. Wilmont, Chancey Tyler and R. A. Speed, in regard to the price of coal at New Orleans and Memphis and the cost of transportation of coal to those places from Grand Tower, and in admitting the testimony of said respective and several witnesses, as to the price of coal in October, November and December, 1870, at those places, as evidence on behalf of the plaintiffs.

11. The court erred in refusing to instruct the jury upon the several points and propositions as was requested (Record, pp. 52–53,) by counsel for defendant.

12. The court erred in and by the whole charge it gave to the jury (Record, pp. 53–54), excepted to at the time by the defendant as being an improper and misleading direction and instruction to the jury.

13. The court erred in so much of its charge to the jury as stated, that if from the evidence they should find the plaintiffs entitled to recover as to the quota of coal for October, 1870 (Record, p. 54), "the true measure of damages is the cash value during November, 1870, of the kind of coal mentioned in the contract, at Cairo or points below it on the Mississippi river, after deducting the contract price of the coal and the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation."

14. The court erred in so much of its charge in instructing the jury that if they (Record, p. 54) "come to the same conclusion respecting the November quota of coal, then the measure of damages as to the failure to deliver that quota of coal will be the cash value of the kind of coal mentioned in the contract in December, 1870, at Cairo, or points

south of it, on the Mississippi river, after deducting therefrom the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation."

15. The court erred in its charge to the jury in the instruction it gave (Record, p. 54), "that if they believe from the evidence that the plaintiffs' tow-boats, without any fault on their part, were detained at Grand Tower, during the months of October, November and December, 1870, in consequence of the failure of defendant to deliver coal under the contract during those months, then the plaintiffs are entitled to recover at the rate of fifty dollars for each day that either of their tow-boats was so detained."

THOMAS G. ALLEN, Attorney,
with whom
B. R. CURTIS is of Counsel, for
Plaintiff in Error.

POINTS AND AUTHORITIES SUBMITTED ON BEHALF OF PLAINTIFF IN ERROR.

The main questions involved in this case, and presented by the assignment of the respective errors numbered 10, 11, 12, 13, 14 and 15 (pp. 42–43*), relate to the construction of the contract and the measure of damages—assuming the company, without proper excuse, failed and refused to deliver coal as stated in the respective counts of the declaration.

I.

We insist that the contract in question contains the expressed and conclusive agreement of the contracting parties; and that the measure of damages can be none other than the "liquidated damages" therein mentioned. (See the *ninth* section of the contract (p. 4).

On this point we cite the following authorities: *Hudson Canal Co.* vs. *Penna. Coal Co.*, 8 Wallace, 284; *Sheets* vs. *Selden*, 7 Wallace,

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* *Note.*—References so made in these Points, and in the Argument which follows, indicate the paging in the foregoing Abstract and Statement of the Case.

442; *Partridge* vs. *The Ins. Co.*, 15 Wallace, 579; *Bealey* vs. *Stuart*, 7 Hurlstone & Norman, 753; *Whittle* vs. *Frankland*, 2 Best & Smith, 49; *Pilkington* vs. *Scott*, 15 Messon & Welsby, 657; *Rigby* vs. *Great Western Railway Co.*, 14 *Id.* 811; *Aspdin* vs. *Austin*, 5 Q. B. 671; *Seddon* vs. *Senate*, 13 East, 74; *Benson* vs. *Dunn*, 23 L. T. N. S. 848, Exch.; *Kerr* vs. *Kuykendall*, 44 Miss. 137; *Insurance Co.* vs. *Thorp*, 22 Mich. 146; *Lynde* vs. *Thompson*, 2 Allen (Mass. R.) 456; *Hall* vs. *Crowley*, 5 Allen, 304; *Brinkerhoff* v. *Olf*, 35 Barb. 27; *Brown* vs. *Manby*, 17 Ind. 10; *Hise* vs. *Foster*, 17 Iowa, 23.

II.

The rule of damages as given to the jury by the Circuit Court is erroneous, as applied to the averments in the several counts of the declaration, and the facts in this case, even though the contract in question could be properly construed as containing an implied covenant binding the company to the payment of damages other than the liquidated damages mentioned in the contract. The recovery of probable or supposed profits, or other speculative damages, is not allowable in actions founded on breach of covenant or contract.

On this point we refer to the following authorities: Parsons on Contracts, Vol. 2 (4th Ed.) page 454, sec. 5; Kent's Com. Vol. 2 (9th Ed.) page 649; Greenleaf Ev. Vol. 2 (9th Ed.) § 256, § 261; Sedgwick on Damages, 232, 260, 268, 273, 418, 450; and to the cases referred to in notes to the text, in the books above cited. Also to *Amiable Nancy*, 3 W. 546; *La Armistace de Rues*, 5 W. 385; *Watson* vs. *The Ambougate, Nottingham and Boston Railway Company*, 3 Eng. L. & E. R. 497; *Hamlin* vs. *The Great Northern Railway Co.* 38 Eng. L. & E. 335; *Williams* vs. *Reynolds*, Am. Law Reg. N. S. Vol. 5, 370; *Green* vs. *Mann*, 11 Ills. 616; *Chicago & Rock I. R. R. Co.* vs. *Ward*, 16 Ills. 527; *Olmstead* vs. *Burke*, 25 Ills. 87; *Heiner* vs. *Richter*, 51 Ills. 301; *Hays* vs. *Moyniham*, 52 Ills. 426; *Blydenburg* vs. *Welsh*, 1 Baldwin, 339; *Milton* vs. *Hudson River Steam Boat Co.*, 37 N. Y. 214; *Pollit et al* vs. *Long*, 58 Barb. 20; *Hayden* vs. *Cabot*, 17 Mass. 169; *Squire et al* vs. *Western Union Telegraph Co.*, 95 Mass. 232; *Pittsburg Coal, Co.* vs. *Alexander W. Foster et al*, 59 Pa. St. Repts. 365; *Douty* vs. *Bird*, 60 Pa. St. Repts. 53; *Muldron* vs. *Norris*, 2 Cal. R. 74.

III.

Without the provision in the contract confirming the parties to the liquidated damages, this case is one—assuming it was not shown the company was excused from making a delivery of the coal—wherein, by the evidence it is shown the measure of damages should be limited, in respect to the non-delivery of coal, to the difference between the contract price and the market price of the same description of coal at the time and place where, by the contract, the company was required to deliver it.

We cite on this point (in addition to the authorities on the second point, applicable also to this) the following cases: *Worth* vs. *Edmunds*, 52 Barb. 42; *Wicker* vs. *Hoppock*, 6 Wallace, 99; *Gillis* vs. *Space*, 63 Barb. 177; *Hamilton* vs. *McPherson*, 28 N. Y. 72; *Chandler* vs. *Allison*, 10 Mich. 460; *Smith* vs. *Dunlap*, 12 Ills. 192; *Phelps* vs. *McGee*, 18 Ills, 158; *Dure et al* vs. *Lewis et al*, 51 Ills. 257; *Shepherd* vs. *Hampton*, 3 W. 200; *Hopkins* vs. *Lee*, 6 W. 109; *White* vs. *Tompkins*, 52 Penna. Repts. 363; *Clark* vs. *Pinney*, 7 Cowen, 681; *Sargent* vs. *Franklin Ins. Co.* 8 Pick. 90; *Roses' Executors* vs. *Bozeman*, 41 Ala. 678; *Bazin* vs. *Steam Ship Co.*, 3 Wall. Jr. C. Ct. 229.

IV.

The question presented by the assignment of the error numbered 1 (p. 39) is the alleged insufficiency of the declaration. Each count thereof is defective in substance; and therefore the demurrer to the pleas should have been carried back to the several counts, and judgment thereon should have been for the defendant.

On this point the authorities cited, showing the proper construction to be placed upon the contract, apply in support of the objection to the declaration; and the following other authorities as to the rule, in pleading, in such cases: *Aurora City* vs. *West*, 7 Wallace, 93; *Haynes* vs. *Lucas*, 50 Ills. 438.

V.

The error numbered 2 (p. 40) presents the objection to the ruling of the circuit court in sustaining the demurrer to the defendant's 4th plea. The plea is to the whole declaration, and shows upon its face a substan-

tial defence to plaintiffs' alleged cause of action. The demurrer to the plea should therefore have been overruled.

On this point we rely upon the elementary and well settled rule that a plea substantially good can not be set aside by a general demurrer; Stephens' on Pld.* 142; *Ogden* vs. *Lucas*, 48 Ills. 493; *Read* vs. *Walker*, 52 Ills. 333; *Martin* vs. *Barton Iron Works*, 35 Ga. 320.

VI.

The evidence referred to in the separate and several assignments of the errors numbered 3, 4, 5, 6, 8 and 9 (pp. 40–41), had no proper application in the case, either as to the measure of damages or the issue joined by the pleadings. It should therefore have been rejected for the several and specific reasons assigned in support of defendant's objections as set forth in said separate assignments numbered as above stated.

In support of our objections to all of that irrelevant evidence, we cite the following authorities: Greenleaf on Ev., Vol. 1 (11th Ed.), § 51; Best's Principles of Evidence, §§ 229–249; *Insurance Companies* vs. *Wright*, 1 Wallace, 468; *Allen* vs. *Killinger*, 8 Wallace, 480; *Roxburghe* vs. *Robertson*, 2 Bligh, 156; *Webb* vs. *Plummer*, 2 B & Ald. 746; *Roberts* vs. *Barker*, 1 C. & M. 808.

VII.

The Circuit Court should have allowed the question of defendant's counsel put to the witness, H. R. Driggs, and should not have made the statement in the hearing of the jury in regard to the letters specified in the error assigned numbered 7 (p. 41). It was the defendant's right to have the circumstances and facts in connection with those letters explained to the jury by other evidence. *McCrea* vs. *Piermont*, 16 Wend. 460; *Beaver* vs. *Taylor*, 1 Wallace, 642; Stoy on Agency, 134–137; *Bank* vs. *Steward*, 37 Maine, 519; *Runk* vs. *Ten Eyck*, 4 Zabr. 756; *Mussey* vs. *Beecher*, 3 Cush. 517, and authorities there cited.

ARGUMENT OF JUNIOR COUNSEL FOR PLAINTIFF IN ERROR.

In Submission to the Court:

If in this case there is any departure from the Rule in respect to the abstract, errors alleged, and the points and authorities, prepared on behalf of the plaintiff in error, it is to be ascribed to my inexperience, and not to the senior counsel whose name appears to the assignment of errors, and who will make the closing argument. My effort has been to so state the case as to lay, plainly, before the Court, with the errors assigned, so much, and no more, of the record as may require inspection in the determination of the several questions which arise upon the pleadings, evidence, and instructions refused, as well as upon the instructions given by the Circuit Court.

As stated in connection with the first point submitted, the principal question is:

1. What is the proper construction of the contract involved in this case, in respect to the measure of damages—assuming that the company inexcusably failed and refused to deliver coal as stated in the respective counts of the declaration?

We insist the question is answered by the express stipulation of the contracting parties, as stated in the *ninth* section of the contract, *viz:* twenty-five cents for each and every ton of coal the company so failed to deliver, and fifty dollars for each and every day that either of the steam tow boats were detained at Grand Tower in consequence of such failure on the part of the company to comply with the terms of the contract. Such was the positive agreement of the contracting parties. By their own deliberate act, they determined for themselves, in advance, that for any inexcusable default on the part of the company to deliver coal, Phillips & St. John should be paid damages to that extent and no more; and that for any inexcusable default on the part of Phillips & St. John

to provide barges for the receipt of the coal, the company should be paid, as damages, the sum of twenty-five cents per ton, and no more, for each and every ton less than one-half the number of tons of coal Phillips & St. John were, by the terms of the contract, bound to receive from the company. This agreement was made, and it is so expressed in the contract, in regard to *monthly quotas* of coal. The fact that the contract provides that Phillips & St. John "may *elect* to receive all or any part of the coal" not delivered in a preceding month in the next succeeding month, in which case the quota which the company would otherwise be bound to deliver, is to be "increased in such succeeding month to the extent of the quantity in default," does not warrant the construction contended for by the defendants in error, to the effect that for an inexcusable failure on the part of the company to deliver the quota of coal so elected by them to be taken in the next succeeding month, the damages are to be determined by a measure other than the one provided for in the contract.

The mere election of Phillips & St. John to have the whole "or any part" of the previous monthly quota of coal carried over and made a part of the quota of the next succeeding month, would be no legal waiver, if they failed to receive it in the succeeding month, of their right to the liquidated damages due therefor at the end of the previous month. Their right to the liquidated damages due them for the non-delivery of coal at the end of the previous month, would be a subsisting valid claim at the end of the "succeeding month," even though in that "succeeding month" the company by reason of accidents or other unavoidable causes mentioned in the *eighth* section of the contract, should fail to deliver and be excused from the payment of the liquidated damages for the non-delivery of coal in that succeeding month. And this for the reason that the contract fixes and fastens the liquidated damages upon the respective *regular* monthly quotas, and not the "increased" quota of any particular month.

The security thus given to Phillips & St. John for the payment of the "liquidated damages" in the event of their failure, for any cause, to receive the "coal in default" in the next succeeding month, after their election to so receive it, is not the only feature of the contract which refutes their claim to other than the liquidated damages for its non-delivery. It will be seen the section last referred to gives the company

the right to demand and recover from Phillips & St. John liquidated damages of twenty-five cents per ton only "for each and every ton less than *one-half* of said quota"—*the regular monthly quota stipulated for in the contract*—which, by their fault, they fail to receive from the company. It makes no provision—secures nothing to the company—for a failure on the part of Phillips & St. John to take the quantity they may have elected to carry over into and receive the next succeeding month as a part of the quotas of that month, although after their election to so receive it the company may have been put to great expense in mining the coal and preparing to deliver it. For example: Suppose, or admit it to be true, as Phillips & St. John in their declaration have alleged, that the company inexcusably failed to deliver them the regular quota of 15,000 tons of coal in October, and that they elected to receive it in November as a part of the quota of that month, and then suppose the company had put an extra force of miners at work and made all necessary preparations to deliver to Phillips & St. John 30,000 tons of coal in November, and after the delivery of 7,500 tons—the price of coal having dropped down to less than the contract price—they, Phillips & St. John, had flatly refused to receive another ton of coal in that month—all the damage that could be legally claimed by the company from Phillips & St. John for their refusal to take the other 22,500 tons of coal would be just *nothing!* And why? Because, the contract provides, in that ninth section, that if Phillips & St. John "shall fail in any month to furnish barges or other suitable vessels to receive in regular daily quantities the quota which *they are bound under the contract to receive*," &c—they shall pay, as liquidated damages, twenty-five cents for each and every ton less than one-half of that quota. As appears by their own construction of the contract, 15,000 tons per month was all *they were bound to receive in any one month.* After having taken one-half of that quantity they would, of course, be exempt, under the contract, from the payment of any damages for not taking the 15,000 tons, (the October quota) *they were not bound* under the contract to receive in *November*, but for the non-delivery of which in October they might at the end of the month either demand and receive the liquidated damages of twenty-five cents per ton, or "elect" to receive the coal, or any part of it, in the next succeeding month. It nowhere appears, however, in the contract that such an election would *bind* Phillips & St. John

to receive the October quota in November, or that their election so to receive it would release their claim for the liquidated damages for the non-delivery of it in October, if they failed to receive it, or the company failed to deliver it, in the month of November.

There is still another feature of the contract which plainly shows it was not intended, and that it would be grossly inequitable to construe the contract as containing an implied covenant binding the company to the payment of any damages other than the "liquidated damages" therein mentioned. We have only to look to what would have accrued to Phillips & St. John, as *liquidated damages*, if the company had wrongfully refused to deliver to them the 450,000 tons of coal which by the terms of the contract it agreed to deliver in the course of the three ensuing years. Arithmetic shows, that in that event Phillips & St. John would have been entitled to the enormous sum of over *one hundred and fifty-seven thousand dollars*, with interest added on every monthly instalment thereof unpaid and withheld by the company! And that enormous sum, for the liquidated damages, would have accrued to them without any greater outlay on their part than the trifling expense of keeping one steam tow-boat and a few coal barges for ten months only, in each of the three years, moored at the bank of the river at Grand Tower! And by the same method of computation, it will be seen that if Phillips & St. John had wrongfully refused to receive any part of the 450,000 tons of coal they contracted to receive, the company in no event could have recovered from them more than twenty-five cents per ton, limited to one-half of that amount of coal; aggregating no more than the sum of fifty-six thousand two hundred and fifty dollars with interest added as before stated—but a little more than *one-third* of the amount that by the contract was secured to Phillips & St. John; although the cost to the company for mining the coal and in the preparation for its transportation from the mines to the Mississippi river, manifestly, would amount to a much greater sum than the cost of keeping the steam tow-boat and a few barges ready to receive it in equal daily quantities as provided for in the contract.

That the "liquidated damages," so agreed to, is to be conclusive between the contracting parties, in respect to the failure to deliver or the failure to receive coal, is further shown by the concluding clause of that ninth section of the contract, whereby the provision was made to

the effect, that if the one party should continue in default for two consecutive months, the other party, if not satisfied with the liquidated damages, and not in default, should have the right to declare the contract null and void, and thereafter be released from all further obligations on account of it.

Upon its face, the contract shows unusual care in its preparation. The several clearly expressed mutual covenants therein set forth, forbid the construction contended for by the defendants in error, that a covenant on the part of the company to pay more than the expressed liquidated damages is to be implied.

On this point we refer especially to what was said by this court in the case of *Hudson Canal Co.* v. *Penn. Coal Company.** In that case it was insisted by the counsel for the first named company, as appears in the reported brief, that "In interpreting contracts which seem not fully to express the obligations on both sides, the question is what each party supposed the other party understood by the contract. In other words, the interpretation is to be according to the equity and fair meaning of the whole arrangement, if this does not conflict with the positive provisions of the agreement."

The court, however, held that such a rule of construction applies only to "instruments inartificially drafted, or where the language employed is obscure, imperfect or ambiguous," and also held that "Courts of law cannot incorporate into a sealed instrument what the parties left out of it, even though the omission was occasioned by the clearest mistake; nor can they reject what the parties inserted, unless it be repugnant to some other part of the instrument."

The contract now before the court seems to have been drawn with even greater care than the one upon which this court passed in the opinion from which I have quoted. In that case it appeared the contract was somewhat unilateral; so much so as to impose a heavy loss upon one of the contracting parties; but that apparent fact had no weight with the court in applying the law as stated. In this case, as is shown by what is clearly expressed in the contract, Phillips & St. John secured the insertion of a provision which guaranteed to them, in the event of a breach, the payment of liquidated damages far more than double the amount

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* 8 Wallace, 284.

that was secured to the company; and yet it is insisted they are entitled to still more, by reason, as they say, of an *implied* covenant that obliges the company to pay it!

Who will doubt what their defence would have been, if *they* had inexcusably failed or refused to receive from the company in the month of November, 1870, any part of the 30,000 tons of coal they allege they were entitled to receive in that month by reason of their election to take the October quota in the succeeding month, and the company had sued them for more than the liquidated damages prescribed in the contract? In such a case, an offer of proof by the company of an *actual* not a supposed loss largely in excess of the liquidated damages of twenty-five cents per ton on the quantity less than one-half the quota "stipulated for" in the contract by Phillips & St. John, would have been met by their prompt objection, to the effect, that as they had *bound* themselves by the contract, to receive no more than 15,000 tons in any one month, they could not be held liable in damages for a failure to receive in any one month a quantity exceeding half of that amount, and that that liability could not be increased beyond the *liquidated* damages prescribed in the contract. Nor could it be maintained by the company that Phillips & St. John had impliedly bound themselves for increased damages because of the hardship thereby imposed upon the company by such a construction of the contract. That they, in their defence, would have invoked the rule of construction as applied in the case of the *Hudson Canal Co.* v. *Penn. Coal Co.*, will not be doubted. And, furthermore, they would have insisted as we insist, and as was said by this court in *Sheets* v. *Selden*,* that "The tendency of modern decisions is not to imply covenants, which might and ought to have been expressed if intended."

In this case, as is shown by a view of the whole contract, the construction we contend for imposes no hardship upon Phillips & St. John. The damages expressed in and secured to them by the literal terms of the contract are four-fold in excess of compensation for any breach thereof on the part of the company; and to men of ordinary ambition, the sum that would accrue to them as liquidated damages for an entire breach would be considered a handsome fortune.

We submit the case is one which comes clearly within the rule as

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* 7 Wallace, 442.

stated in *Lynde* vs. *Thompson*,* (and confirmed by the other authorities cited thereafter in support of our first point) that "Where liquidated damages are agreed on in the contract that is the measure of damages which is to control when there is a breach of the contract."

2. Our second point of objection is, that if the contract can be properly construed as containing an implied covenant binding the company to the payment of damages for the non-delivery of coal, other than the liquidated damages therein stated, the measure of damages as given to the jury in the instructions of the Circuit Court does not properly apply to the facts and circumstances in evidence in this case.

It nowhere appears in either of the counts in the declaration, or in evidence, that Phillips & St. John had entered into a contract with any person or party at Cairo, Memphis, New Orleans, or elsewhere to deliver any portion of the coal mentioned in the contract. It is true the contract provided that they should "have the sale of all coal produced from the mines aforesaid, that *is or shall be sold and delivered* at and below Cairo, Illinois;" not as stated in the charge given by the Circuit Court —"for sale and delivery." But the evidence does not show that the company ever sold or delivered any coal at or below Cairo, in either of the months of October, November or December in the year 1870. Other parties sold small quantities of Pittsburg coal and the prices obtained for it were greatly in excess of the usual prices, owing, as is shown by the testimony of Mr. *St. John* (p. 19), to the "scarcity of coal" and the scarcity was because "there was no means of getting coal from up the Ohio river which was low and the supply ran out;" and because, as is stated in the testimony of *P. D. Pratt*, the agent of Phillips & St. John (p. 22), "No coal boats came out of it that time on account of low water and the closing of the canal at Louisville." Mr. Pratt also testified that "he had been acquainted with the Ohio river about 12 years; that he had been engaged in boating all his life; that it was unusual for the Ohio river to be as low as it was that Fall for a long time;" "that there is generally what they call coal-boat water in the latter part of October and the first of November;" and that "the river is not usually low in November." *W. J.*

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* 2 Allen, 456.

Wilmont, also a witness for plaintiffs, testified (p. 32) "that there is usually a rise in the Ohio river in November, but that it did not rise, he thinks, that particular season until January." He further testified that the price of coal is regulated by the "quantity in the market," and "that the high price was occasioned by low water in the Ohio;" and the same witness said, "that when the Pittsburg coal arrived the price was reduced; that in the city the market price for coal went from 2 to 1 below what it was in November," and that the price of coal to boats was less than to customers in the city. Another witness for plaintiffs, *R. A. Speed*, also testified as to the prices of coal in Memphis in October, November and December. He said (p. 34) "that Pittsburg and the Ohio river supplies that market;" and that the high prices there during those months "were occasioned by a scarcity of coal, the want of a supply and the Ohio river being so low," and that, "as soon as the Pittsburg coal got there the price went down." *Chancey Tyler*, also plaintiffs' witness, testified (p. 33), that the highest price of Pittsburg coal in the New Orleans market when there was an average supply—no default in the market by reason of low water—was from 45 to 50 cents a barrel, at retail, and "that it sometimes went down as low as 42½ cents." And the evidence shows that a "barrel of coal" is 180 pounds and that 2000 pounds constitute a ton of coal. It thereby appears that in the New Orleans market, the average price of Pittsburg coal when there was an average supply—no default in the market by reason of low water—did not exceed five dollars and fifty cents a ton, at retail; and when we take into account the fact as testified to by *Walter M. Phillips*, one of the plaintiffs, "that the coal called for in their contract, rated about a dollar a ton less than Pittsburg coal," and that the cost of transportation of coal from Grand Tower to Memphis was from 25 to 35 cents a ton—coal which under the contract was to cost him and his co-partner, after the allowance of the "rebate of twenty-five cents per ton," but $2.75 per ton for every ton they were to receive from the company—and the further fact, sworn to by Mr. Phillips (p. 21), that they, Phillips & St. John, "*did not sell some of the coal for nearly what they gave for it*," it seems contrary to reason and justice, as well as law, that they should be permitted to recover a judgment of $200,000 damages—a sum more than twice the amount they would have been required

to pay for the coal had they received it from the company; which sum of $200,000 is based mainly on their *supposed* loss of supposed profits on the 30,000 tons of coal they *never sold, or contracted to sell, and for which they never paid as much as one cent, to the defendant, or to any other party or person!*

The law, as is shown by the authorities cited in support of this point, is clearly against a recovery of such supposed damages. But for the large amount involved, and the high character of the Court wherein the rule of damages was (as we respectfully submit) erroneously stated to the jury, we would be content to make no further reference to the adjudged cases. It may not be improper, however, in this argument, to make brief quotations from a few of them.

In the case of the *Amiable Nancy*,* it was held that probable or possible profits of an unfinished voyage afforded no rule to estimate the damages, even in a case of marine trespass. And in *La Armistace de Rues*,† it was again ruled that the probable profits of a voyage could not be taken into account in determining upon the amount of damages. The law is so held in England, as appears by the cases cited. In the case of *Williams* vs. *Reynolds et al*,‡ it was aptly said by *Shee, J.*, in referring to the alleged loss of profits claimed by a plaintiff who had purchased to re-sell, that it was not to be assumed that he would sell at a profit, "for he might sell at a loss as well as at a profit—the loss of profit, therefore, is not the natural result of the defendant's breach of contract."

In *Green* vs. *Mann*, a case decided by the Supreme Court of Illinois, the question was presented as to the measure of damages for the breach of an agreement to properly construct machinery essential to the usual use of a flouring mill, and that court approved instructions to the jury to the effect, that the plaintiff was entitled to the value of the use of that portion of the machinery which the defendant had contracted to furnish, and which by reason of his failure to do the plaintiff was unable to enjoy, but held that the plaintiff was not entitled to recover "speculative damages, such as the loss of profits which he might have suffered in consequence of not having the use of one of the runs of stone," which plaintiff had been unable to use in consequence of the defect in the machinery.

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* 3 W. 546. † 5 W. 385. ‡ Am. Law Reg. N. S. Vol. 5, 370.

In a subsequent case, *Chicago & Rock I. R. R. Co.* vs. *Ward*,[1] it was distinctly admitted by the same court that, "in cases of covenant and contract the rule will confine the party to the material and proximate consequence," and that it "excludes profits generally, and prospective or speculative damages in matters of breach of contract or covenant." And the rule, as stated, has been affirmed in the same court in *Olmstead* vs. *Burke*,[2] *Hiner* vs. *Richter*,[3] and in *Hays* vs. *Moyniham*,[4] wherein it was held that in an action on contract, only the actual or compensatory damages are recoverable.

In *Blydenburg* vs. *Welsh*,[5] it was held, in an able opinion, by *Hopkinson, J.*, that damages to the extent of compensation is the limit; that prospective or probable profits are not allowable. In New York it has been decided by the Court of Appeals, in *Milton* vs. *Hudson River Steamboat Co.*,[6] that in such actions "the damages to be recovered are those that flow naturally and directly from the breach of the contract; that they do not embrace speculative profits;" and the rule is so stated in *Pollit et al* vs. *Long*,[7] and in numerous other cases there cited.

In Massachusetts, the rule as stated in *Hayden* vs. *Cabot*,[8] that "remote and unexpected consequences are never considered as coming within the contract," has been approved in the latter case of *Squire et al* vs. *Western Union Telegraph Company.*[9] To the same effect are the decisions in Pennsylvania, in *Pittsburg Coal Company* vs. *Foster et al*,[10] and in *Douty* vs. *Bird.*[11] And it has been so held, as appears by the cases cited, in repeated decisions in other States. The rule is now so firmly established by sound reasoning and judicial precedents, that this court, we think, will not be inclined to reject it.

3. The third point we submit is, that if it can be held the "liquidated damages" specified in the contract is not the measure and the only measure to which the jury should have been directed, the law which governs the evidence in this case clearly shows they were misdirected by the instructions which allowed them to base their verdict on the different and exceptionable prices of coal at the several places far away from Grand Tower.

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1. 16 Ills. 527.
2. 25 *Ib.* 87.
3. 51 *Ib.* 301.
4. 52 *Ib.* 426.
5. 1 Baldwin, 339.
6. 37 N. Y. 214.
7. 58 Barb. 20.
8. 17 Mass. 232.
9. 95 Mass. 232.
10. 59 Pa. St. Repts. 365.
11. 60 Pa. St. Repts. 53.

It is not shown by the declaration, or by the evidence, in this case, that Phillips & St. John made any effort to procure coal, or that they could not have procured coal at Grand Tower, independent of their contract, to supply themselves, in whole or in part, with 30,000 tons of coal, the quantity they allege the company failed to deliver upon the terms and conditions agreed upon in the contract. But, on the contrary, the evidence does show that there was a coal market, *for purchasers*, at that place, and that the company was selling coal there at stated but not increased prices, during all the months of October, November and December, 1870.

By a reference to the full text in the first count of the declaration (Record, p. 3), it will be seen the averment there is, that "the said defendant did not, nor would deliver the 30,000 tons of coal, nor any part thereof to the said plaintiffs, according to the form and effect of its covenant in said written contract," &c.; and substantially the same averment is made in each one of the other four counts as to the alleged refusal of the company to deliver coal. In every count the alleged refusal is as to "said coal," or "said quotas of coal" mentioned in the contract; dated December 15th, 1869—the breach of which is alleged in the declaration. No charge is made in the declaration that the company refused to sell them other quantities or quotas of coal, or that Phillips & St. John applied for any coal other than the quotas of coal mentioned in that particular contract.

Why the plaintiffs did not apply for and offer to purchase coal outside of their contract after they failed to receive it "under the contract," they made no effort to explain in their own testimony in reply to questions put by their own counsel; but the evidence which was drawn from them by counsel for defendant, on cross-examination, shows, not only that they did not try to purchase coal outside of their contract, but that they were all the while meditating upon an immense speculation in an anticipated recovery of speculative profits, based on the unusual and unexpected low water in the Ohio river, and the consequent scarcity of coal in *New Orleans and Memphis*. *Mr. St. John*, upon his oath, admitted (p. 18) that when they were refused coal under their contract he "did not know the prices of it at that time at Grand Tower; all that he knew about it was the prices at Memphis and below." Said he "never made any effort to learn the price of coal at Grand Tower; that

he wished to know the price below, because that was where plaintiffs traded; that *they did not trade at Grand Tower;* that he did not know of his own knowledge, that coal was sold at Grand Tower;" and further, "that he presumed coal was sold at Grand Tower, but had no idea what price it sold for. He also said (p. 18) "that plaintiffs could have supplied themselves with this coal *only* from the Grand Tower Company." And *Mr. Phillips*, the other one of the plaintiffs, also stated upon oath (p. 21), that he "did not know what coal was selling for at Grand Tower when he was there in October, but his impression is it was selling at $4, or $4.50 a ton." That he "thinks defendant was selling coal to the Memphis Packet Co. under a contract, at $3.50 for lump coal and $1.50 or $2.00 for nut coal; that he is not positive but thinks he had been told it was $2.25; don't know who told him; did not get the information from steamboat men." And he further testified, that when plaintiffs demanded in November their October quota of coal, they made no more specific demand than that; that in December, they made demand for November quota to be delivered in December; thinks they demanded the quota for October and November, in December; thinks the demand was for the quota; that it was not more specific than that. And he also said (p. 20), "that the quantity of coal could not have been bought within 100 miles of Grand Tower at that time;" but was careful not to swear it could not have been bought *at* Grand Tower, at the time.

P. D. Pratt, the agent for plaintiffs at Grand Tower, testified (p. 23) that he "knew in October the Grand Tower Company were delivering coal to steamboats, and to the furnaces in St. Louis; does not know what they got for it, except from Pardee who sold the coal; thinks they sold it to the Memphis Packet Company at $3.50, and thinks they sold nut coal for $2.50; thinks they sold as much coal to other boats as they did to the Packet Company; don't know it positively; can't say they got $4.00 a ton for all they sold the boats; some told witness they were paying that; says the Grand Tower Company sold in November at about the same prices, and also in December; that is according to the best of his knowledge; thinks they sold small quantities outside of what they sold to the boats, and to the furnaces in St. Louis." And *Hiram R. Driggs*, plaintiffs' own witness, testified (p. 23) that he, as the commercial superintendent of the Company at Grand Tower, during the months of October, November and December, 1870, "had charge of all

the commercial business, and that his authority was in writing," in a letter dated August 26th, 1870, addressed to him by Mr. Olyphant, president of the company (which was read in evidence), wherein and whereby he was charged with the duty and instructed "to endeavor to secure a sale of the coal and iron produced by the company, and prompt payment therefor." And the same witness testified, positively (p. 29), that he understood that the letter referred to "had relation to sales of coal outside of existing contracts." It appears, therefore, that Driggs had full charge, was fully authorized, and in no way restricted in making sales of coal to any person or parties, who, outside of existing contracts, might have applied to him to purchase coal during the months of October, November and December, 1870; and his testimony shows (p. 30) that "under that authority," he "did make sales, during those months, every day, to the boats;" but he could not tell the amount of sales in those months;" that he sold coal to outside boats for $4.00; to the Packet Company for $3.50; that those prices were for lump coal; thinks nut coal sold from $2.25 to $2.75; either $2.00 or $2.25 or $2.75 to outside parties; that the proportion of the nut coal was perhaps one-sixth of what was sold; that during the months of November and December "the average price of lump coal was $3.75, and the average price for nut coal about $2.50 per ton;" and that "the prices named prevailed during those three months."

To show how absolute his power was in regard to "all commercial business and in relation to all sales of coal outside of existing contracts," the same witness produced a letter from Mr. Olyphant, the president of the company, dated September 1st, 1870, which was read in evidence by the plaintiffs (p. 26), whereby it was proposed to increase "the price of coal to transient customers at Grand Tower, to $4.50 per ton for lump, and $2.80 for nut coal," after which the witness testified (p. 30) in reply to plaintiffs questions, that "when he received the letter instructing him to put coal up to $4.50, he did not do it; that he did not change the price for the reason he thought it would not be policy;" and, furthermore, "that he presumes he could have got more than $4.00 if he had thought it policy to put up the price." In view of this positive testimony of their own witness as to his absolute control at Grand Tower and continued sales of coal "outside of existing contracts" during October, November and December, 1870, plaintiffs were well aware they could

not prove by *Hiram R. Driggs*, the former *commercial superintendent* of the company, that he or any one having authority so to do, had ever refused to sell coal, or had informed Phillips & St. John they could not purchase coal on the same terms as the company sold to other parties "outside of existing contracts;" but, nevertheless, they endeavored to prove by him (p. 28) that somebody—it does not appear who—had been refused by somebody—it does not appear whom—"a small quantity of coal to get the Grand Lake out of danger or to moor her somewhere"—to which the court interposed or added this question, "Did they refuse any portion of coal?"—meaning, of course, any portion of the quota mentioned in the declaration. And the witness replied he believed they did, but thinks they (who is not stated) made the demand of some one else, not to him.

There being such convincing evidence of continued sales of coal at Grand Tower, at prices which were not changed at all during all the time plaintiffs failed to get coal delivered to them under the contract, and no evidence showing the slightest effort on their part to procure coal outside of their contract, but rather a pre-determination to do nothing whatever towards obtaining an outside supply, the case is one (if we exclude the provision in the contract in regard to liquidated damages,) wherein the measure of damages should be limited, in respect to the non-delivery of coal, to the difference between the contract price and the market price of the same description of coal at the time and place where by the contract the defendant was required to deliver it, and the jury should have been so instructed.

In the case of *Worth* vs. *Edmunds*,[1] the rule of law is thus stated: "A party is not at liberty to remain inactive, and recover damages even of a party who has violated his contract." * * * "Because one party violated his contract the other is not at liberty entirely to disregard his own interest, and then seek full indemnity by the recovery of damages against the defaulting party. The law is not so unreasonable or so unjust." The same view is expressed in *Wicker* vs. *Hoppock;*[2] *Gillis* vs. *Space;*[3] in *Hamilton* vs. *McPherson;*[4] in *Chandler* vs. *Allison;*[5] and appears to be a rule of law which ought not to be seriously questioned. Therefore, if we lay out of view the agreed "liquidated damages" the

1. 52 Barb. 42. 2. 6 Wallace, 99. 3. 63 Barb. 177. 4. 28 N. Y. 72. 5. 10 Mich. 460.

rule governs as stated in Greenleaf on Evidence,[1] that "upon a contract to deliver goods, the general rule of damages for non-delivery is the market value of the goods *at the time and place of the promised delivery*, if no money has yet been paid by the vendee." That declared rule has been repeatedly recognized by the Supreme Court of Illinois. In the well considered case of *Smith et al.* vs. *Dunlap*,[2] wherein a number of the English and American cases were referred to, it was distinctly approved; again in the case of *Phelps* vs. *McGee*;[3] and in the subsequent case of *Deere et al*, vs. *Lewis et al.*[4] The rule is one of general application, as is shown by the other authorities cited in support of this third point.

4. By the fourth point submitted it is insisted the demurrer to the pleas should have been carried back to the respective counts of the declaration—and this for the reason that neither one of the counts alleges anything which upon a proper construction of the contract entitles plaintiffs to the damages thereby claimed.

That which has been advanced in support of the exceptions to the charge and instructions to the jury applies in support of this objection to the declaration—for inasmuch as the declaration ignores the measure of damages provided for in the contract, the departure from the contract is fatal to the claims as alleged by the plaintiffs. There are also these other reasons why the declaration should have been held substantially defective:

The first and second, are the counts which claim damages for the non-delivery of two monthly quotas of coal—the October quota and the November quota—and damages are claimed for an alleged loss of profit on the quotas of those two months, which it is alleged (pp. 7–8) plaintiffs "*could have sold*" at a certain large profit therein mentioned, "*after* said month of November." Even if it could be properly held the liquidated damages, provided for in the contract, is not the only measure, it is manifest, in view of the law which governs in cases where no liquidated damages are agreed upon in the contract, that damages are not allowable based on prices which might possibly have been obtained for the coal in question, *after* the month in which it is alleged it should have been delivered. And the Circuit Court sustained this view, in

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1. Vol. 2, § 261. 2. 12 Ills, 192. 3. 18 *Ib.* 158. 4. 51 *Ib.* 257.

effect, in the charge it gave to the jury; for they were instructed (p. 37) that for the non-delivery of the October quota in November, "the true measure of damages is the cash value *during* November, 1870, of the kind of coal mentioned in the contract;" not the cash value of the coal *after* the month in which it should have been delivered.

The third count (the first of the additional counts) is based on an alleged refusal to deliver the October and November quotas during the first fifteen days of December, 1870. This goes upon the assumption that the plaintiffs, under the contract, had the right to elect and carry the monthly quotas of two or more months into a succeeding month. They, however, abandoned this view as untenable, and took leave (p.15) to withdraw that count—after the demurrer to the pleas had been decided.

The fourth count (the 2d additional count) claims damages only for the alleged non-delivery of the *October* quota in November. It includes no claim for damages for the non-delivery of the November quota. And the claim is based (p. 13) on a declared loss of profit it is alleged plaintiffs "*would have made*" on the sale of that *October* quota, "*from and after* the last day of November, 1870." In addition to this defect, the same as appears in the first two counts, said fourth count claims damages other than the liquidated damages mentioned in the contract, for the alleged non-delivery of one single monthly quota unadded to the quota of the next succeeding month, without showing plaintiffs were ready and willing to receive it with and as a part of the so increased quota of that next succeeding month.

The fifth count (the 3d of the additional counts) is obnoxious to the same substantial objections that are made to the fourth count. It claims damages (p. 13) for the alleged non-delivery in December of the *single* monthly quota of *November*, based on a declared loss of profit it is alleged plaintiffs were deprived of by reason of defendant's alleged failure to deliver said coal; and it is alleged in said count that on and after the 15th day of December, 1870, "plaintiffs *could have sold* all said quota of coal for *November*, so carried over to December," for a large profit, &c. There is no claim in said fifth count for liquidated damages, or for damages for the non-delivery of any coal except the alleged non-delivery, in *December*, of the said November quota.

As neither of the pleas interposed the general issue, the demurrer

should have been applied to the several counts of the declaration; for it is a well settled rule of law, as stated by this court in *Aurora City* v. *West*,* that although the pleadings demurred to may be bad, the court will nevertheless give judgment against the party whose pleading was first defective in substance.

5. The objection stated in the fifth point, is in reference to the ruling of the Circuit Court in sustaining the demurrer to defendant's 4th plea. It will be perceived (p. 9) it is a plea to the whole declaration, and alleges facts which constitute a substantial defence to the plaintiffs alleged cause of action. It craves oyer of the contract referred to in the declaration, &c.; after which follows the averment, that on the 15th of December, 1869, "a supplemental written and sealed contract, and further agreement" (profert of which was made), was entered into by plaintiffs and defendant, whereby it was stipulated and agreed that neither of said parties who had entered into and become bound by the contract mentioned in the declaration "*should be excused for any failure, neglect or departure from the items of said first mentioned written contract, on and after the first day of April*, 1870;" after which follows an averment, in substance, that by the terms of the contract, the provisions of which and the facts in respect thereto are stated in the plea, the plaintiffs were in default, and were owing defendant, during all the months of October and November, 1870, the sum of $6,000 for and on account of the liquidated damages of twenty-five cents per ton, on the several large amounts of coal, plaintiffs, by their inexcusable default in not providing barges, &c., prevented defendant from delivering in the previous months of July, August and September, to-wit, the aggregate amount of 36,416 tons of the 45,000 tons of coal plaintiffs by the terms of the contract were bound to receive from defendant during those months; and the further fact is averred in the plea that it is *stipulated in and by said written contracts* that if plaintiffs should fail to pay their maturing obligations *and indebtedness* to defendant, due and owing by the terms and under the provisions contained therein (the provisions in said *contracts*) then the defendant should be released from any obligation to make further delivery of coal to said plaintiffs. The plea also avers facts

* 7 Wallace, 93.

showing plaintiffs were not excusable for their failure to provide barges, &c., to receive the tons of coal above stated in said months of July, August and September; and it avers that by reason of the facts set forth in the plea, the company was released from any obligation, and was not bound to make deliveries of coal to the plaintiffs, Phillips & St. John, during the months of October and November, 1870.

That the facts set forth in the plea, and the truth of which is admitted by the demurrer, present a defence, seems too clear to admit of question. It will be perceived the demurrer to the respective pleas (p. 14) makes no sufficient assignment of any special objection which entitles it to be treated as a special demurrer. Therefore, no formal defect in the plea is to be considered an objection, it appearing that the facts alleged therein constitute a substantial defence in bar of the action—for the elementary rule applies in this case as stated in Stephens on Pleading,* that matters of *form* are only reached by special demurrer, and that in such cases the special demurrer must assign the ground of objection; that it is not sufficient to object in general terms that the pleading is "uncertain, defective, informal" or the like; but it is necessary to show *in what respect* uncertain, defective or informal.

6. The sixth point is upon the objections made and exceptions taken to the rulings of the Circuit Court in admitting evidence, on behalf of the plaintiffs, which had no relevancy either to the issue or the proper determination of the measure of damages.

The only issue before the jury as to a fact, unmixed with a question its of law, was the one presented by the defendant's first plea—which by terms applied (and it was so treated) to all the counts of the declaration.

The plea alleged (p. 9) that plaintiffs *did not* furnish and deliver to the defendant, barges, &c., "suitable and sufficient to receive in equal daily proportions the said quotas of coal, as said plaintiffs in their declaration have alleged," &c. All other facts alleged by plaintiffs, material to their asserted right to recover damages, were, before the trial commenced, admitted by the pleadings, as was afterwards stated by the Circuit Court (p. 37) in the charge given to the jury. It is, therefore, manifest that all the evidence objected and excepted to by the defend-

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ant, which tend to pdid not prove orrove that one single issue of fact, or which did not properly relate to the measure of damages in the event that issue should be determined by the jury against the defendant, was erroneously admitted. This view has the support of the "established rule," as stated in Greenleaf on Evidence, that it is "the FIRST RULE, governing in the production of evidence, that the *evidence offered must correspond with the allegations, and be confined to the point in issue.*" The same author says the "rule supposes the allegations to be material and necessary." And he further says "surplusage, therefore, need not be proved; and the proof, if offered, is to be rejected." And furthermore, that "this rule excludes all evidence of *collateral facts*, or those which are incapable of affording any reasonable presumption or influence as to the principal fact or matter in dispute; and the reason is, that *such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and moreover the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it.*" The italics, in the sentence last quoted, are mine. The quotation is so marked because of its pointed application to this particular case.

Tested by the foregoing rule, I submit the evidence specified in the errrors assigned (pp. 40–41) and referred to by number in the *sixth* stated point now under discussion, had properly no right to go before the jury.

The evidence in regard to the number of barges Phillips & St. John had under their control at Cairo, Memphis, New Orleans and other places *away* from Grand Tower, was outside of the positive and unqualified averment contained in the declaration that plaintiffs *did have barges, &c., during all the time* (the months of October, November and December, 1870,) *at* Grand Tower. Moreover, it was not averred in the declaration that plaintiffs did have, intended or expected to have, all those absent barges brought to and laid up at Grand Tower during those several months, on account of receiving the coal in question; nor was it averred in the declaration, or shown by other evidence, that those absent barges were *unavoidably* kept out of other employment during those respective months; only averred that "plaintiffs were compelled" to keep them unused during all that time. And the explanation is, in the declaration, that they were so compelled "by the said default of defendant"

to deliver coal; and yet the declaration shows, and the demurrer sustained to defendant's pleas worked an admission of the fact, that the company had positively refused to deliver any coal under the contract, during those months Phillips & St. John allege they were "compelled" to keep all their barges—those absent ones included—idle and unused. The evidence, therefore, as to those absent barges, was not pertinent to the issue, and its effect undoubtedly was, and no doubt Phillips & St. John so intended it, to persuade the jury to include in their verdict a large amount as compensation for the use of a large number of barges which the company, by plaintiffs own showing, *did not compel them* to keep idle.

The same reasoning applies in support of the objection made to the admission of Mr. St. John's testimony in regard to his conversation and discussion with Mr. Olyphant in New York. That was still more remote from the issue on trial than the evidence in relation to absent barges. It had no possible connection with the issue of fact or the issue of law involved in the trial of the cause; and, unexplained as it was, by reason of the subsequent ruling of the court disallowing an explanation of the facts and circumstances which were connected with that controversy, it was evidence only calculated to prejudice the jury, unfavorably, towards the defendant, and, therefore, it should have been excluded.

The introduction into the case of evidence in regard to an application by somebody to somebody at Grand Tower "for a small quantity of coal to get the 'Grand Lake' out of danger or to move her somewhere," was wholly foreign to the issue on trial, even if it had been shown, which it was not, that the *company* had refused to furnish coal for that purpose. Such evidence was, however, well calculated to impress the jury with an idea that the defendant had refused such an accommodation, and therefore should be held responsible for such refusal, in the suit then pending, by an assessment of additional damages for the non-delivery of the quotas of coal which, by the pleadings, it was fully admitted, before the commencement of the trial, the company had refused to deliver to the plaintiffs. The evidence, of course, could have no other effect but to prejudice the jury against the defendant.

The letters written by Mr. Olyphant and addressed to the witness, H. R. Driggs, referred to in the 5th assignment of errors (p. 40) had no relevancy whatever to the *issue on trial by the jury*. Nor did the

plaintiffs' counsel venture a statement that the letters were offered in evidence to prove the affirmative of the issue then pending before the jury. They, of course, had an object in view. And it must be admitted (no one will deny it) that the effect of those letters—*unexplained* as they were, by reason of the subsequent ruling of the court, disallowing explanatory evidence of the facts and circumstances connected therewith—was to impress the jury with the idea that the president of the company had inexcusably intended and resolved to disregard the contract he had made on behalf of the company. But inasmuch as the plaintiffs had not alleged in their declaration an entire breach of the contract, and as it did not appear upon the face of the letters or by any other evidence in the case that the letters had ever been shown or the contents thereof made known to the plaintiffs, or that the instructions therein contained had been acted upon by Driggs or any other person, except to the extent of the admitted refusal to deliver the respective monthly quotas of coal as alleged in plaintiffs' declaration, there was no foundation for the admission of such evidence. And, therefore, the reading of those unexplained letters to the jury was almost equivalent to an instruction that they should award the largest possible verdict against the defendant. As to the *explanation* that defendant was entitled to and desired to have made in regard to those letters, that will be referred to before closing the argument.

Other errors included in this sixth point as to the admission of evidence irrelevant to the issue are those assigned numbered four, eight and nine (pp. 40–41), referring to the evidence which was admitted to prove that plaintiffs "had been in business in New Orleans under a contract with defendant;" that "the coal market on the Mississippi river is subject to fluctuation owing to variations in the stages of the Ohio river;" and that "business men make calculations with reference to these variations"—all of which was objected and excepted to by the defendant as irrelevant and otherwise inadmissible to the issue on trial. By that evidence (though it was not stated for what purpose it was offered) the plaintiffs, designed no doubt, to have it applied in the construction of the contract—to make it appear that because plaintiffs *had been* in business *in New Orleans* under a *previous* contract with the defendant, and because the Ohio river was subject to *variations*, and because business men make *calculations* with reference to those variations, that

therefore that *former business in New Orleans*, coupled with those *variations in the Ohio river* and the *calculations of business men*, was to be used, in *some way*, as a rule of construction that would enable the Court to arrive at a better understanding of what was intended by the written agreement, entered into by Phillips & St. John and the company, than could be derived by the unaided plain reading of the carefully worded different provisions of that agreement!

Clearly, such remote and indefinite evidence was not proof of, nor did it even tend to prove, either usage or custom in regard to the making of contracts for the purchase, sale, or delivery of coal, at Grand Tower, or at any other place; and, therefore, even if it could be properly held that evidence of usage or custom is allowable in cases of this character, the evidence last mentioned was improperly admitted.

That this is not a case wherein usage or custom can be invoked to explain or control the legal effect of the written contract is shown by the English authorities cited on this point, and conclusively so by the ruling in this court, in the case of *Insurance Companies* vs. *Wright*,* and other cases there cited. As the evidence objected to had no application to the issue, its tendency was to mislead the jury, to the prejudice of the defendant, and therefore it should have been rejected.

7. The seventh point presents the questions involved in the assignment of the seventh error (p. 41) alleged in regard to the refusal of the Circuit Court to allow defendant's counsel to cross-examine the witness H. R. Driggs, as to "under what circumstances that correspondence from Mr. Olyphant was given, and about the difficulty with Phillips & St. John about the time those letters were written and previous to it," and as to whether he did not know that "Phillips & St. John had been bothering the company;" and also as to the ruling made by the Court, that "the letters show the circumstances under which they were written, sufficiently."

The letters having been read to the jury *as evidence*, for some purpose —what the exact purpose was was not stated by counsel for plaintiffs— it was for the *jury* to determine the exact worth and sufficiency thereof; and like all other evidence in that class belonging, as this Court expressed it in *Beaver* vs. *Taylor*,† "to the same category with what are called

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* 1 Wallace, 468. † 1 Wallace, 642.

verbal facts," it was open to explanation. It was therefore proper for the defendant to draw from the *plaintiffs' witness* who produced those letters, and to whom they had been addressed as official and business correspondence by the defendant's agent, whatever further evidence could be obtained by cross-examination of the witness, showing, or tending to prove, under what circumstances the letters were written, and about the difficulty with Phillips & St. John about that time and previous to it—the letters themselves, in evidence, having shown there was some difficulty existing, at the time and previous to the time they were written, and that it was in regard to the business of the company, represented by its president the writer of the letters, and Phillips & St. John, *at whose instance the letters were introduced in evidence.* The circumstances under which the letters were written and addressed to Driggs the witness, were therefore a part of the *res gesta.* Those circumstances, and that existing difficulty which led to and induced the writing of those letters, were unquestionably, a part of the same matter in regard to which the letters were offered and allowed in evidence. Further evidence in relation to the same matter, in the nature of explanations, from the very witness who had been in an official position which undoubtedly enabled him to know all or a part of the circumstances, would have enabled the defendant to have placed those letters in a very different light from the one in which they appeared without that explanation—and would have removed from the minds of the jury that opinion which the letters occasioned to the prejudice of the defendant, as was manifested by the verdict which awarded to the plaintiffs (to their astonishment no doubt), the full amount of their enormous claim for alleged damages.

That there were existing circumstances, which were well known to the witness, Driggs, and that would have explained those letters (which we insist were improperly in evidence), is undeniable from what does appear within the record in this case.

It is evident that if Phillips & St. John had been acting fairly at all times with the company, they would not have objected, as they did, through their counsel, to the question put to *their own witness H. R. Driggs*, as to what had been their action in the premises. Their conduct must have been exceedingly bad if they could not trust an explanation of it from the mouth of the man who had been the once trusted "commercial superintendent" of an incorporated company doing business

to the extent of hundreds of thousands of dollars per year; whose power and influence therein was so great that he could even venture (p. 30) to overrule and disregard the suggestions of the chief executive officer in regard to the selling price of coal; who conducted the business in accordance with what *he* thought the best "policy;" and who afterwards "made up his mind he wanted to go and resigned" (p. 29); who finally turned up a witness in this case, as he himself admits, "*at the instance of Phillips & St. John*;" and who at the trial of this cause (p. 25) with well affected modesty, by an appeal to the judge of the court, as to whether he was "obliged" to show them, produced from his side pocket a "roll of letters" which he admitted were not "strictly private" but official in their character, and which he had carried from the business office of the company at or about the time he made up his mind he *wanted* to go and therefore resigned his employment as the company's commercial superintendent—if I say, Phillips & St. John could not trust such a witness to state the truth in regard to their conduct, towards the company, which led to the written correspondence they had so obtained and offered in evidence, their conduct must have been bad indeed!

This much the record plainly shows: By their demurrer to the defendant's *fourth* plea (p. 9) Phillips & St. John have admitted the facts as there stated, that they had failed to furnish barges and receive from the company during the months of July, August and September, 1870, as many as 36,416 tons of the coal they had contracted for and bound themselves to receive, in stipulated quotas, during those three months; and that they were owing the company in and during the months of October and November of that year a large sum of money on account of the "liquidated damages" for their failure in receiving that coal. And the evidence of Mr. St. John shows (p. 19) that the money he paid to the company in November of that year, on account of the liquidated damages for their failure in taking the September quota only, was not paid willingly, but "under protest."

That there were some serious and annoying difficulties existing at Grand Tower, occasioned by the conduct of Phillips & St. John, prior to the 10th of September, 1870, and long before there was any rise in the price of coal in the Memphis or New Orleans markets, is shown by Mr. Olyphant's letter of that date, put in evidence by the plaintiffs themselves, wherein he wrote to Driggs (p. 24) to the effect that after having

had a conversation with Mr. Bennett (the former superintendent who had resigned), he felt more than ever anxious to put an end to the contract with Phillips & St. John, not because he had any objection to urge to their agreed price for coal—as the effort was to make it appear to the jury—but because of their "waste" of the river fleet belonging to the company, and the *embarrassment* to the business of the company "which *their action* necessarily involves." Again he wrote to Driggs as is shown by the letter dated the 30th of September (p. 27), in respect to the anticipated rupture with Phillips & St. John and the possibility of a suit and their recovery of damages, that "we (the company) had better pay the full amount every month" (meaning of course the liquidated damages provided for in the contract), "than go on *as at present.*"

That the company was greatly embarrassed in its business by the action of Phillips & St. John, and liable to great loss, by the way they were using the river fleet belonging to the company, is manifest from what thus appears. How much more could have been shown as to the details of that embarrassment, or to what extent, if any, Driggs himself had contributed, by writing letters, or otherwise, to provoke Mr. Olyphant into a written declaration of risking the result of a law suit rather than submit to the existing annoyances, Driggs could have told under the solemnity of his oath, and by the help of a rigid cross-examination, of the character indicated by the question which was objected to by Phillips & St. John. The explanation sought and desired was due both to Mr. Olyphant and the defendant—that his action might not be misrepresented and misunderstood, and that the company, whose agent he was, might not be prejudiced by an erroneous construction of those letters. Whatever may have been intended by Mr. Olyphant, under the existing circumstances as he understood them when he wrote the letters, his mere intentions were not binding upon the company; nor could he have bound the company, if he had been so disposed, by any action on his part outside of the lawful prosecution of the business of which he had the official control.

I respectfully submit, that upon a view of all the errors assigned, it will be found the company is well entitled to its prayer for a reversal of the judgment and verdict rendered in the Circuit Court.

THOMAS G. ALLEN,

ST. LOUIS, MO.

Of Counsel for *Plaintiff in Error.*

Supreme Court of the United States.

October Term, 1874.

NO. 61.

(No. 334 of the October Term, 1873.)

GRAND TOWER MINING, MANUFACTURING AND TRANSPORTATION COMPANY, *Plaintiff in Error.*

vs.

WALTER M. PHILLIPS AND DAVID L. ST. JOHN, *Defendants in Error.*

REPLY TO THE BRIEFS AND ARGUMENTS OF COUNSEL FOR DEFENDANTS IN ERROR.

Submitted by

THOMAS G. ALLEN,

Of Counsel for Plaintiff in Error.

Barnes & Beynon, Printers, 215 Pine Street, St. Louis.

printed brief,) says: "Defendants in error *insist* and plaintiff in error *admits* then, that this 25 cents a ton *liquidated* damages has no application—no reference, to anything *but* the *regular* monthly quotas; and for non-delivery of these quotas *only* the party of the first part shall pay to the parties of the second part, as liquidated damages, twenty-five cents for each and every ton which it may have failed to deliver."

Plaintiff in error has made no such admission. In saying "that the contract fixes and fastens the liquidated damages upon the respective *regular* monthly quotas, and not the "increased" quota of any particular month," I assert that which I conceive to be the consistent, and therefore the proper meaning of the words found *in* the contract.

In support of my construction I submit this further illustration: Suppose it had been shown the company made default in the delivery of 10,000 tons in October, and that Phillips and St. John elected to take 5,000 tons—a *part* of the quantity so in default—in the next succeeding month; their election to take that part of the 10,000 tons in the next succeeding month would certainly not have been either a release or a waiver of their immediate right to the liquidated damages of 25 cents per ton for the 5,000 tons which they did not elect to have delivered in the succeeding month. And why? Because when the *default* occurred the company at once became liable to pay the liquidated damages for "*each and every ton*" it had inexcusably failed to deliver in October. It is so declared in the contract. What then becomes of that fixed liability as to the other 5,000 tons? The view expressed in the brief of opposing counsel is, that as to that quantity, elected to be delivered in the succeeding month, the liability is released by the mere *election to have it delivered* in November. I have argued in my former brief, and yet insist, that the exercise of the right of election to have it delivered in the succeeding month as a part of the so "increased" quota to be delivered in that month,

is but a postponement of the right to demand and recover the fixed liquidated damages if there should be a failure on the part of the company to deliver it in that month. That is to say, the election to have the 5,000 tons delivered in November would be but a waiver of the right to demand the liquidated damages, as to that quantity, at any time before the end of that succeeding month, but no waiver of the right to demand and recover the agreed liquidated damages after that time, if the company failed to deliver it in the month of November—for by the terms of the contract Phillips & St. John would then be entitled to the 25 cents per ton "for each and every ton" that was not delivered in November.

I so insist because the contract expressly says, that an election, such as stated, is to have the effect to *increase* the quota to be delivered in the succeeding month, "to the extent of the quantity in default"—the quantity not delivered in the preceding month,—and it furthermore says, that if the company "shall fail in *any* one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled to in *such* month," the Company shall pay, "as liquidated damages, twenty-five cents for each and every ton which it may have so failed to deliver."

Had it been intended, by both parties to the contract, that the company should pay more than the agreed "liquidated damages," it would have been an easy thing to have inserted, in the contract, the proper words to express that intention. To warrant the construction contended for by the opposing counsel we must disregard the words "all or any part of" (which words are omitted in their copy of the contract), and we must also disregard all other words in the same sentence following after the words "in which case," and insert, in lieu of the words there used, such words as will make the contract read as they construe it. With the ninth article *so* amended, it would read as follows: (the substituted words being printed in italics)—

"It is further mutually covenanted and agreed that if for any other "than the unavoidable causes hereinbefore mentioned, and through "no fault of the parties of the second part, the party of the first part "shall fail in any one month to deliver all or any part of the quota of "coal to which the parties of the second part may be entitled in such "month, the party of the first part shall pay to the parties of the "second part, as liquidated damages, twenty-five cents for each and "every ton which it may have so failed to deliver; or instead thereof "the parties of the second part may elect to receive * * * * * the "coal so in default in the next succeeding month, in which case" *the party of the first part shall be bound to deliver it in the next succeeding month in addition to the regular quota of coal to which the parties of the second part may be entitled in such month, and if the party of the first part shall fail to deliver all or any part thereof in the next succeeding month, it shall pay to the parties of the second part whatever actual damage may result to the parties of the second part by reason of such default.*

To show more plainly the distinction between the contract as *construed* by opposing counsel, and the contract as worded, by the agreement of both parties, I submit the exact copy of what does appear in the *ninth* article after the word "deliver." It is this:

"or instead thereof, the parties of the second part may elect to "receive *all or any part of* the coal so in default in the next succeed-"ing month, in which case the quota which the party of the first part "would otherwise have been bound to deliver under this contract, "shall be increased in such succeeding month to the extent of the "quantity in default."

The italicized words are those omitted in the version given on page 3 of the abstract furnished by Mr. Gilbert.

It will be seen, I think, by what I have argued and shown, that it is not true as Mr. Gilbert has argued (on page 43 of his brief) that because Phillips and St. John exercised their right of election to take the October coal as a part of the quota to be delivered in the next succeeding month, that therefore they "forever" lost their right to the twenty-five cents per ton liquidated damages. Nor is the assertion correct as argued by Mr. Green (of the firm of Hay, Green & Littler),—beginning on page 5 of his printed

argument. He there says, that the exercise of the right of election to take the October quota in the succeeding month was an election "not to accept" the liquidated damages fixed by the contract. He also says, Phillips & St. John "bargained for the right of election between the liquidated damages and the coal." The language of the contract does not so express it. It shows they bargained for coal *or* the liquidated damages of twenty-five cents per ton, and $50 per day for the detention of their steam towboats, whether the failure to deliver was in October or November. Mr. Green further says, in referring to the construction I have given the contract, that "the breach of the right of election it seems involved no consequences whatever to the defendant"—meaning the company. If by that he intends to be understood (as I suppose he does) that the company would incur no risk and no liability other than the liability to pay the liquidated damages for the failure to deliver the coal in the month *succeeding* the month in which the company first failed to deliver it, his assumption, I think, is a grave mistake, for the reason that the contract not only expressly provides for the payment of the liquidated damages for the non-delivery of the coal and the fifty dollars per day for each and every day's detention of the steam towboats, on account of the company's inexcusable failure to deliver it, but also gives to Phillips & St. John, in that event, the right to deprive the company of all future gains from the rental of its river stock, leased to Phillips & St. John, (stipulated for in the *third* article,) and also of all future profits in the sales of coal, or from the liquidated damages secured by the contract to the company.

Both parties agreed to that provision contained in the last clause of the *ninth* article. It was inserted for their *mutual* protection, so that if either party became dissatisfied with the liquidated damages, in the event of the neglect or refusal of the other party for the period of *two* consecutive months to perform its engagements as set forth in the con-

tract, the party not in default could at once put an end to the contract and be released of all further obligations on account of it.

That Phillips & St. John would have so viewed and so construed the contract but for the unexpected and unusual prices of coal in Memphis and New Orleans in the months of November and December, 1870, occasioned by the unusual low stage of water in the Ohio river during those months, is not at all doubtful. Had coal sold during those months at a loss to the shippers, Phillips & St. John would never have thought of the construction they now seek to have placed upon the *ninth* article of the contract. If they had failed to get coal for *two* consecutive months they would have congratulated each other upon having secured a contract which guaranteed to them such handsome profits under the name of "liquidated damages."

The article in question, worded as it appears in the record (and on page 4 of my former brief), is the *mutual* covenant of the contracting parties. Its meaning, therefore, is to be gathered, not from the words in one-half of the sentence wherein occurs the provision concerning the privilege of election, but by reading also the other half of the sentence, and all the provisions contained in that ninth article. If we fail to so read the contract we must ignore the authority cited by Mr. Gilbert on page 57 of his brief (*Hazleton Coal Co. vs. Buck*, 57 Penna. St. Repts. 301), wherein it is said, "It is a cardinal rule of interpretation of mutual contracts that you are not to abrogate or impair one part of a contract by another when that other has an appropriate meaning which fully satisfies the words." I rely upon that authority as an unboubted support to the construction I have placed upon the ninth article of the contract.

In addition to the foregoing, I ask attention to the admission made by Mr. Green (on page 9 of his printed argument) which seems, to me, conclusive against his construction of the provisions in question. He there says, the plain-

tiffs (*Phillips & St. John*), "for their own protection, inserted a provision in the contract reserving to themselves the right *not* to take liquidated damages; that the defendant deliberately accepted this stipulation as a substantial element of the agreement; that the defendant did not insert, nor did the plaintiffs agree to any such provision with respect to the remedy of the defendant. Each party bargained for such rights as were supposed to be sufficient for its purpose." Another admission made (page 7 of his printed argument) is this: He there says, "We take it for granted, that in framing the agreement the parties fully considered the consequences that would be likely to arise to them respectively, by reason of any breach."

I have looked in vain through the contract to find such a provision as Mr. Green says *Phillips & St. John* inserted "for their own protection." It no where appears in the contract that they "reserved to themselves the right *not* to take liquidated damages." That right they could have exercised without inserting such provision. The law compels no man to take money, though he may have a right to receive it. Mr. Green has been unfortunate in the selection of words if his intention was to say that *Phillips & St. John* inserted a provision in the contract giving them a right to demand and recover *actual* damages instead of the "liquidated damages," if the company inexcusably failed to deliver in any successive month the coal not delivered in the month preceding. That, however, he could not say, for the contract shows no such provision. What, then, is the meaning of Mr. Green when he says the parties framing the agreement "*fully* considered the consequences that would be likely to arise to them respectively, by reason of any breach," and that *Phillips & St. John* inserted in the contract the provision "reserving to themselves the right *not* to take liquidated damages?" Mr. Green gives no explanation of his meaning other than such as may be inferred from his argument, and

that is, that it was *Phillips & St. John* who inserted the provision in the *ninth* article of the contract, which Mr. Green says is to be *construed* as giving to Phillips & St. John the right to claim and recover *actual* instead of the "liquidated damages." If *Phillips & St. John* were the authors of that provision why did they leave it so ambiguous as to require construction? Why did they have the article so worded as to read, that for the inexcusable failure of the company to deliver "the quota" of coal deliverable "in *any* one month" the company should be liable to pay "liquidated damages"? And why did they insert after the words providing for their right of election to take "all or *any part* of the coal" not delivered in any one month in the next succeeding month, the provision that when they had so elected, "the quota" the company would be bound to deliver in the next succeeding month should thereby be "*increased* in such succeeding month" to the extent of the quantity they might thus elect to make a part of "the quota" of that succeeding month?

These questions have not been answered by opposing counsel. And yet they insist upon having the provision they say their clients inserted—a provision which gives rise to so much discussion as to its meaning—so construed as to enrich their clients at the expense of the party which only accepted the provision after *Phillips & St. John* had prepared and inserted it in the contract!

In arguing in support of his construction, Mr. Green further says, (page 9 of his printed argument) that Phillips & St. John "knew that during a great part of the period covered by the contract, they would probably lose money in carrying it out;" and they therefore "stipulated for a right of election." He furthermore says, "They were well aware that a time would probably come, when it would be more profitable to the defendant to break the contract than to perform it." That "if after losing largely on coal received during periods of low prices, they should be compelled to accept twenty-

five cents per ton instead of market rates for all coal which defendant might withhold during periods of high prices, they could not but regard themselves as being at the mercy of the other contracting party." That in the estimate *they* made "of the prospects and profits of the business, they considered twenty-five cents per ton as the lowest measure of damages by which they could be compensated for the mere expense of maintaining their fleets and coal yards under any circumstances, and that it was very apparent much higher damages would be required to cover their loss if deprived of the advantages of a high market." And he also says, that "in view of those considerations they *expressly* stipulated for the right of taking liquidated damages if they should so elect, or of rejecting such damages and calling for the coal itself if their interest would be best subserved thereby."

In reply to all that explanation, my answer is, then why did they not *expressly* stipulate for *actual* damages if they failed to get the coal in the month succeeding their election? The learned counsel says, that privilege of election was prepared and inserted by *Phillips & St. John*. Why then, did they mask their real meaning by the use of words which require a forced construction and a disregard of other words, to give effect to the contract as they say they *intended* to make it? The omission of the learned counsel to make answer to this question is an admission which is certainly conclusive against them. I will not say of *their* "theory" of the contract as they have said of mine, "that the legal effect of the right of election bargained for by plaintiffs, when closely examined degenerates into absurdity." I merely cite their "logic"—and submit the law which refutes it.

To give effect to the contract as construed by Phillips and St. John—a contract which is ambiguous, if at all, only because of the particular provision which *they* inserted—when the language of the whole contract warrants a construction more favorable to the other contracting party, would be, as seems to me, a clear disregard of the settled

rule of law which forbids a construction favorable to the party who by his own intention or negligence omits the use of words which, if used in the contract, would have obviated all doubt as to its meaning. If in this case, other *words* had been inserted in the contract, it would have been a contract different from the one which now appears in the record.

The rule of law to which I have referred is tersely stated in an opinion of the Supreme Court of Illinois, in the case of *McCarty* vs. *Howell* (24 Ills. 343) wherein it it said "There is a rule in the construction of written contracts, that the words used, where ambiguous, are to be construed most strongly against the party employing them, regard being had, however, to the apparent intention of the parties, as collected from the whole context of the instrument." The rule so stated is supported by the declaration found in Blackstone's Commentaries—(Vol. 2, 380 side pageing). That high authority says but for such a rule " men would always affect ambiguous and intricate expressions provided they were afterwards at liberty to put their own construction upon them."

The rule, as stated, has been approved by this court, in *Noonan* vs. *Bradley* (9 Wallace, 407). In that case it was said, where there is a doubt as to the construction which should be given to an agreement, that construction should be adopted which would be more to the advantage of the party who accepted it, " upon the general ground that a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him."

That the *ninth* article in the contract *is* somewhat ambiguous is admitted and shown by the different constructions which have been placed upon it by the opposing counsel.

In all the counts, excepting in the second count of the original declaration, they assume that the failure of the com-

pany to deliver the October quota in November and the November quota in December, entitles Phillips & St. John to claim and recover actual instead of liquidated damages for the detention of their tow boats in the respective months of their detention.

In the *second* count of their original declaration they make the claim that Phillips & St. John are entitled to the "liquidated damages" for such detention.

In the two counts of their original declaration, and in their second and third additional counts, they have assumed that after Phillips & St. John had elected to take the October quota in November and the November quota in December, the quotas were not to be blended, the October quota with that of the regular quota for November, and the November regular quota with the regular quota to be delivered in December. The counts last mentioned are framed upon the theory that after Phillips and St. John had elected to take the October coal in November there were two distinct quotas, due and deliverable in that month, and so in respect to December, after they had elected to take in that month the regular quota which was not delivered in November.

In the first of their additional counts—which was withdrawn by them *after* it had been successfully impeached by a demurrer—the learned counsel put forth another theory, and that was that Phillips & St. John were entitled under the contract to elect, from month to month and receive, in pursuance of their election, in any month succeeding their election, whatever quantity of coal the company had made default in delivering in any one or more of the previous months.

In all the counts of their declaration the learned counsel have wholly ignored the provision in the *ninth* article of the contract, which unmistakably says that when there has been an exercise of the right of election to take in the succeeding month "all or any part of the coal" of the preceding month, "the quota of the succeeding month shall be

increased in such succeeding month to the extent of the quantity in default." They have also ignored, in the declaration and in their arguments, that other provision, contained in the same article, which expressly says, by a reasonable construction of the language used, that if after there had been two distinct elections made by Phillips & St. John in *two* consecutive months, there was shown to be an inexcusable failure on the part of the company to deliver the coal and a waiver on their part to accept of the "liquidated damages" for its non-delivery, that then it was their right and privilege to annul the contract and thereby deprive the company of all the benefits the contract secured to it.

There is still another feature in this case which shows the opinion expressed by opposing counsel as to the meaning of the contract is not to be relied on. It seems they entertain a divided view in regard to it.

Mr. Gilbert says (page 45 of his brief), that if after Phillips & St. John elected to take the October quota in November they had refused to receive it, their default would have entitled the company to *actual* damages in lieu of the liquidated damages provided for in the contract. *Mr. Green* says (page 7 of his printed argument), as I have argued in my former brief, that "it is very true that if the plaintiffs (Phillips & St. John) should fail to accept any monthly quota of coal, or should prevent the defendant (the company) from delivering it, the damages which the plaintiffs would be required to pay could only extend to twenty-five cents for each ton *less than one-half the monthly quota so refused*." This, he says, "is the express provision of the ninth section of the contract." His admission that such would be the extent of the damages to be recovered by the company as to *any* monthly quotas is, I take it, an admission that in the absence of any expressed provision allowing actual damages, the contract is to be construed as confining both parties, when entitled thereto, to the "liquidated damages" provided for in the contract.

The single fact that the contract prescribes "liquidated damages" to be paid for the non-delivery and for the non-acceptance of the coal, which is the principal subject matter of the contract, is, of itself, I submit, a sufficient reason why neither of the contracting parties should be permitted to insist it was their intention to secure to themselves, under certain unforeseen circumstances, such damages as are not expressed in the contract.

This court held, in *Sheets* vs. *Sheldon* (7 Wallace 416) that covenants will not be implied "which might and ought to have been expressed if intended." In this case the *expressed* covenant is for the payment of "liquidated damages."

II.—AS TO THE CLAIM FOR "ACTUAL" DAMAGES.

In respect to this branch of the case, Mr. Green says (page 37 of his printed argument), the Circuit Court "in permitting the plaintiffs to show the market price of coal at the times when delivery should have been made under the contract, did not violate any rule of law with respect to the recovery of profits as legitimate damages." And he further says (page 38), that *had* Phillips & St. John "sold the coal they would have received the market price for it." He admits, however (page 39), they had no special contract for the re-sale of the coal by means of which they could have realized prices greater than those which "any person whatever could have obtained for the *same* coal, at and below Cairo."

Mr. Green makes no allusion to the proof, in the record, which so plainly shows the unusual and unexpected circumstances which caused the enormous and extraordinary prices in New Orleans and Memphis in November and December 1870. The proof is that it was Pittsburgh and Ohio river coal which was relied on to supply those cities, and that in consequence of the unusual low water in the Ohio river, and the closing of the canal at Louisville, the "supply" of coal

ran out; that it was that unusual scarcity which led to such prices as were obtained by the retail dealers who happened to have coal on hand at the time of that famine in the coal market of those cities. That such prices are to be taken as the "market rates" by which to determine the "actual" damages in this case—if we discard the provisions in regard to "liquidated damages"—is a proposition which is not sustained by the cited authorities, nor is it sustained by the theory of the declaration or by the reasoning of the learned counsel who have endeavored, by argument, to sustain it.

It is claimed by Phillips & St. John in the first count of their declaration, that they could have sold the coal, had they received it, "in the course of *regular* and legitimate trade, at a net profit of a large sum, to-wit: the sum of $9.00 per ton." In the second count it is claimed they could have sold it "in the *regular* and legitimate course of trade," at the net profit stated in the first count. The second of the additional counts, which were filed several months after the first two counts, makes no claim that they could have sold the coal in the regular course of trade, but merely alleges they were prevented by the non-delivery of it "from realizing great gains and profits," and furthermore, that they "could have made a net profit on said coal had the same been delivered, of a large sum, to-wit, $20 per ton." The other remaining count in their declaration claims they "could" have sold the coal "south of Cairo for a large profit, to-wit, a profit of $15 on each ton thereof."

It thus appears from their declaration, as their counsel admits, that Phillips & St. John had made no sales of the coal in question at "market rates" or at any other rate; and the evidence establishes the fact that if the coal had been delivered to them Phillips & St. John could not have sold it at the prices which the Circuit Court allowed to be proved as "market rates" which prevailed in the months before mentioned.

The proof is (see testimony of Mr. Tyler, page 50 of the

printed record) that the "highest price of Pittsburgh coal in that market (New Orleans) when there was an average supply, no default in the market, was from forty-five to fifty cents a barrel at retail," and that for larger quantities "the price varies every season—sometimes forty, fifty, seventy, seventy-five, eighty cents, and sometimes lower than the lowest figures." The evidence further shows that the Grand Tower coal usually sold for ten cents a barrel less than Pittsburgh coal. A comparison of those average prices with the exceptional prices in November and December, 1870, will show the enormous difference. Mr. Wilmont testified (see page 48 of the printed record) that the price of coal in November was $1.25, and in the month of December $2.00 a barrel, and that the reason for it was "there was no Pittsburgh coal arriving then." And the same witness said, that if there had been 30,000 more tons in the market the prices *would not have been what they were at that time.* All the witnesses testified that when the usual supply of Pittsburgh and Ohio River coal arrived, the price of coal went down to its usual rates. That the extraordinary prices were not "market rates" within the meaning of the law, which under certain circumstances allows such rates to be proved as a rule for the measurement of damages, is, I think, virtually admitted by the failure of counsel to so allege in their declaration, and by Mr. Green's statement (page 49 of his printed argument), wherein he says: "That can only be regarded as a market where rates are controlled by fair competition between both buyers and sellers." And he furthermore says, that "rates fixed by the *dealer* only, can never be very reliable as measures of value."

That the "rates" which prevailed at New Orleans and Memphis in the months of November and December were not rates controlled by "fair competition," such as would have existed had there been the usual supply of Pittsburgh and Ohio river coal, to say nothing of the 30,000 tons claimed of the company by Phillips & St. John, is manifest

from the evidence. The small quantity of coal which was then in those cities was in the hands of retail dealers who availed themselves of the unusual scarcity occasioned by the unusual low water in the Ohio river and the closing of the canal at Louisville, to put up the prices, knowing that, for the time, there could be no "fair competition" between "buyers and sellers." The retail dealers well knew that the buyers—the consumers of coal—would have to pay just what they, the retail dealers, saw proper to ask for it. This is clearly shown by Mr. Wilmont's testimony, himself a retail dealer residing at that time in the city of New Orleans. He testified (see page 50 of the printed record) "that there could not have been as many as 15,000 tons purchased during the months of November and December 1870. He further said, there was that much in New Orleans, "but it was sold by those *in the retail business.*" And it was the same witness who stated under oath, that had there been 30,000 more tons in the market the price of coal would not have been what it was.

I can conceive of no more convincing evidence than that which appears in this case, to show that the prices or rates which prevailed in New Orleans and Memphis, in the months referred to, were not such "established" prices as were in the contemplation of the parties at the time they made the contract; neither were they such prices as could have been obtained by Phillips & St. John in the "regular" course of trade, or in the course of "regular trade," as is alleged in their declaration.

That the supposed profits—the enormous prices referred to—were not within the contemplation of Phillips & St. John at the time they made the contract, is obvious. If such profits had been anticipated they would not have so worded the contract as it now reads in respect to the payment of "liquidated damages" of twenty-five cents per ton for the non-delivery of "all or any part of the quota of coal," to

which they *might* be entitled "in *any* one month" during the continuance of the contract.

That such enormous prices were not in view and did not influence the president of the company when he wrote the letter dated September 30, 1870, addressed to the company's superintendent, is obvious, for in that letter he said the company "had better pay the full amount every month than go on as at present"—meaning the full amount of the "liquidated damages." And the reason for that conclusion is shown in his previous letter, dated the 10th of the same month, in which he refers to the *waste* of the company's river fleet then in the possession of Phillips & St. John, and the embarrassment to the company's business which their action necessarily involved. The evidence shows that the company did not advance its prices for coal, and that it was not proposed to increase the price to an extent greater than the "increase at St. Louis." It so appears by the president's letter dated Sept. 1st, 1870, in which he directed Mr. Driggs to "put up the price of coal to transient customers at Grand Tower to $4 50 per ton for lump and $2 80 for nut coal"—because the *St. Louis* prices would be advanced that much. And Diggs swears he did not obey the instruction because *he* thought it would not be "policy" to do it. The evidence further shows that the company's prices for its coal, sold and delivered at Grand Tower, *were not changed at all during the year* 1870. The company therefore obtained no additional profits by reason of the enormous and exceptional prices which were obtained in November and December of that year by the *retail dealers* in New Orleans and Memphis. Their gain was unforeseen, entirely unusual, and speculative.

It clearly appears the "profits" referred to in the declaration, and the prices shown by the evidence, are just such "profits" as the law terms conjectural, speculative and contingent, and therefore not allowable as damages in actions of breach of covenant or contract.

On this point, in addition to the authorities cited in my former brief, and in the brief of opposing counsel, I refer to *Baker* vs. *Drake et al*, (53 N. Y., 211) and *Horne* vs. *Midland Railway Co.*, L. R. 8, C. P. 131; 28 L. T. R. (N. S.) Ex. Ch. 312.

III.—IN CONCLUSION.

In respect to the remaining questions presented by the assignment of errors, I find nothing in the briefs of opposing counsel which is not fully answered by the record, and by what appears in my former brief.

There is, however, one mistake, in the brief of Mr. Gilbert, which I may properly correct. In discussing the character of the *fourth* plea, he seems to have overlooked the contents of the plea; otherwise he would not have said (page 81 of his brief) that the words "*and indebtedness*" (italicized at the bottom of page 63 of my former brief), "are mere interlopers," and that "the contract contains no such words." By an examination of the plea (page 11 of the printed record), it will be seen the plea craves oyer of the *first* contract, and avers there was a "supplementary" contract made, whereby the parties became bound as is set forth in the plea; that by the terms of said written *contracts* (not the *first* contract alone) it was stipulated that if Phillips & St. John "should fail to pay their maturing obligations and indebtedness," that then the company should be released from any obligation to make further delivery of coal. The plea alleges they did not pay their indebtedness, and the demurrer thereto admits the fact. For the reasons advanced in my former brief, I insist and submit the fourth plea presents a good defense to each and all of the counts in the declaration.

As the rule requires counsel to confine their argument to the matter within the record, I forbear to refer, in this reply, to assertions made by Mr. Gilbert in support of what he

terms "*the real merits of the case.*" This Court will decide upon the merits as presented by the record of the proceedings in the Circuit Court. So believing, I submit the case.

THOMAS G. ALLEN,

Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

GRAND TOWER MINING, MANUFACTURING, AND TRANSPORTATION COMPANY, Plaintiffs in Error,

vs.

WALTER M. PHILLIPS AND DAVID L. ST. JOHN, Defendants in Error.

No. 61.

BRIEF ON THE QUESTION OF DAMAGES, IN REPLY TO THE BRIEFS OF DEFENDANTS IN ERROR.

Assuming that the defendants below, by a breach of their obligations under the contract to deliver to their vendees coal according to the stipulations of the contract, became liable to a recovery in this action by the plaintiffs below of *damages* for such breach of contract, there is manifest *error* in the rulings of the court, in the admission of evidence and in the charge to the jury, under which this enormous verdict of $200,000 has been obtained.

First. The contract itself provides, as the whole consequences of the vendor's default in delivering under its obligations, that the vendor "shall pay to the vendees, *as liquidated damages*, twenty-five cents for each and every ton which it may have so failed to deliver;" and further, the vendor shall pay to the vendees, "*as liquidated damages*, fifty dollars for each and every day that either of the steam tow boats of the vendees may be detained in consequence of such failure."

Neither interpretation nor extraneous considerations are

needed to explain or enforce this stipulation as giving, completely and conclusively, *the law of the measure of damages to these parties* for the *vendor's* default in delivery.

If a resort to other parts of the contract were needed, the corresponding provision of liquidated damages to the vendor upon the vendees' default in receiving, confirms the circumspect and comprehensive purpose of the contracting parties to conclude, reciprocally, all questions of law and fact in regard to damages, as between vendor and vendee, by these stipulations.

If resort to extraneous considerations, to show the reasonableness and prudence of these *a priori* stipulations, and to vindicate their wisdom, were useful, the record, whether in the evidence or the verdict, exhibits the monstrous consequences to which less circumspect forecast *might* have exposed the parties.

It is not necessary to insist upon the binding obligation, in law or morals, of these stipulations of the contract. They not only furnish a consideration, each for the other, but they constitute together a *fundamental limitation* upon the whole affirmative scheme of the contract, without which neither party would have committed itself to so extensive engagements in amount, in length of time, and in variety of contingencies. Either party may well claim the disturbance of this restrictive limitation upon the mutual engagements, as a violent subversion of the contract.

Second. The attempt of the *vendees* to escape from the *application* of these conclusive stipulations of the contract on the subject of damages, *at their election*, cannot be tolerated. It rests, entirely, upon a misconception of a subordinate provision of the contract, and upon a false inference based upon that misconception.

It will be observed that the primary obligation of the contract, as respects the vendor's delivery of coal, is created

and defined by the *first article*. The *quantity* of coal is to be 150,000 tons *per year*, the *time* of delivery between 15th February and 15th December, and the *rate* "in equal *daily* proportions as near as may be."

The *fifth* article first introduces the period of a *month* into the contract, by providing that mutual settlements under the contract shall be made *monthly*.

Upon this arrangement of monthly settlements, the *ninth article* provides for the ascertainment of defaults by vendor in delivering, or of vendees in receiving, the *daily proportions* for the month, and the computation of the liquidated damages for non-delivery or non-acceptance, to enter into the mutual monthly settlements provided in the *fifth* article. In this way and for this purpose the term "*monthly quota*" is introduced in the *ninth* article.

Upon this ascertainment and computation the vendees have an *absolute right* to insist upon and receive their liquidated damages for any short deliveries of coal during the month, as a part of the monthly settlements provided for in the fifth article.

But, without impairing this *absolute right* of the vendees, the *ninth* article puts at their option, the privilege to carry the deficiency in the delivery for any one month into their demand, under the contract, for the next succeeding month, thereby gaining for the vendees a right to the *increased quota*, during that month, *to the same intent and effect as if the primary obligation of the vendors for that month had covered such increased amount.*

The language, in which this optional privilege is conferred, is too explicit and unequivocal to be misunderstood. It is, that, (instead of receiving in the monthly account, the liquidated damages for deficient delivery that month,) the vendees "may elect to receive all or any part of the coal so in default in the next succeeding month, in which

case the quota which the vendor would otherwise have been bound to deliver under this contract, shall be increased in such succeeding month to the extent of the quantity in default."

It is difficult to impute to this language either incompleteness or uncertainty.

Whether the *privilege* is of greater or less practical importance and value to the vendees is immaterial. Being optional, the vendees' *rights* are not disparaged.

If the vendees, upon calculation of their interests, and in reference to their special sub-contracts, choose to take coal that they are not obliged to take, and give up the present liquidation of their damages, they will exercise this option, and either receive the coal, or, on continued default, receive their liquidated damages.

But, that, in according this option to the vendees, the vendor was careful to measure the *right* in respect to this postponed delivery, in case of continued default, to the right upon a primary default, is shown by the express definition of the *vendor's liability* in respect of the postponed amount, as being the *same* as is stipulated in respect of an original amount. This measure of the vendor's liability is defined by placing the postponed amount upon the same footing as if it were not a *postponed*, but an *original*, amount in the succeeding month. Thus, the clause provides, "the quota which the party *would otherwise have been bound to deliver* under this contract, shall be *increased* in such succeeding month *to the extent of the quantity in default.*"

Third. Against this plain language of the contract, it is vain to impute purposes and consequences to this optional privilege, which, instead of merely carrying over and merging in a future quota a deficiency in a past quota, *subvert the whole scheme of liquidated damages, and give an election to the vendees to acquire, at their mere option, a complete claim to actual damages.*

The vendor, certainly, may demand some definite and explicit *covenant* of his own to be pointed out, whereby the absolute and deliberate purpose of both parties to exclude *all* conjectural or disputable damages for non-delivery or non-acceptance, is frustrated or subverted at the will of the vendees.

The doctrine of this court against the *implication* of covenants not found in solemn contracts is too well established to be shaken. The briefs furnish abundant authorities to this effect.

The necessary effect, then, on the part of the vendees, is to draw out of this mere option to extend the quantity demandable in any one month, by the addition of any short delivery in the preceding month, a right to the vendees to claim, upon renewed defanlt in respect to the transferred deficiency, actual and not liquidated damages.

If this claim was based upon a mere grant of the option to the vendees, to carry over the deficiency, and the contract had been silent as to the situation in which the parties would be placed towards each other in respect of the transferred deficiency, it would seem to be a violent and irrational inference, that the law of damages, so carefully fixed by the contract, was affected, in the least, by this option on an independent subject, and framed *diverso intuitu*.

But, when we find the contract not silent, but speaking on the very point as to the form and manner in which the exercise of this option by the vendees should affect the position of the vendor, as to obligation and responsibility, there would seem to be no room for inference or argument on the subject.

The expression of the contract simply places the deficient delivery back into the contract rights of the parties for the ensuing month, as if the quota of that month originally included it. Against this explicit provision, what opportunity is there for argument that the transferred defi-

ciency is separable from, is divisible from, is distinguishable from, the amount which it increases, in respect of the vendor's obligation to deliver, or its responsibility for non-delivery?

Yet all the arguments presented in behalf of the vendees, are based upon certain *inconveniences* which would arise, it is said, from giving the natural force to this provision, and which would justify the court in separating and dividing what the contract has aggregated, and making a different law of damages for one part, against the dominant purpose of the contract to have *no* law of damages but that of liquidated damages for all defaults of non-delivery and non-acceptance.

These suggestions, in the main, come to one head, to wit, that unless the option of the vendees carries the consequence claimed for it, it is of so little practical importance, as to make its insertion in the contract insensible.

This is the whole argument of the vendees' counsel in their briefs, and the few observations made by his honor, Judge Davis, upon this clause in the contract, when the case was before him on a demurrer, turn upon the same view.

Defendants' Brief, pp. 4–15, citing Judge Davis' opinion, pp. 14, 15.

Now, in the very nature of this option of the vendees, it needs not to be, ostensibly or presumably, of any necessary importance in the general scheme of the contract, or in the motives and calculations which led to its actual frame. As it was a *free* option, impairing no actual rights if unexercised, and if exercised, exposing to no ultimate loss of actual rights, the vendees, understanding their own business, might find advantage in the exercise of the option, and they lost nothing by its possession. The practical working of the privilege would be, that if, at the settlement for any month, liquidated damages were preferable to a continued right to the coal under the contract, the vendees would take their liquidated damages. If, on the other

hand, a larger right to coal for the ensuing month were preferable, the vendees would hold on to the right and exercise the option. They would thus either be sure of the coal, or at the end of the month resume their right to the liquidated damages. Whether their exercise of the option and the vendor's fulfillment or default would have proved their exercise of the option advantageous or not, was a matter of contingent calculation.

If, in addition, it was desired by the vendees to acquire an *optional right to actual instead of liquidated damages*, they should have inserted such an option in the contract.

But this pretension is a mere *afterthought*, when the *lis mota* has arisen, and when its serviceableness to the vendees, under the strange circumstances of the transaction, exhibits itself.

The true light in which to construe this or any other contract, is that in which it is looked at by the parties as a working scheme of mutual interest, and in that light the meaning and object of this clause are apparent.

In the natural and expected course of transactions under the contract, it would not appear till the end of the month whether the "daily proportions" of the contract had been completely delivered. The vendees, in view of this uncertainty, and contemplating their own transactions, as based upon the full supply in the aggregate, without caring for an accurate division between months, might well suggest that the short delivery should not peremptorily preclude them from having an optional right to have it made up to them the next month, if the state of the market or their sub-sales made it desirable to them. In doing this they had the same guarantees of the delivery of the increased amount that they had of the whole amount covered by the contract, to wit: the payment of liquidated damages in default.

It is idle to speak of this final reduction to liquidated damages as making the obligation nugatory. That vice,

if it be one, inhered to the whole delivery, and was reciprocal. The *measure*, no doubt, was intended to be, and was, large enough to cover the ordinary profits of the trade to which the contract relates. This brings us back to the unanswerable question, if new penalties and new responsibility were to attend the obligation in respect of the *postponed* deficiencies, why were they not expressed and determined, and some method of *discriminating* in the deliveries of the succeeding months between what belonged to that month and was subject to the law of *liquidated* damages, and that which came over from the previous month and was to be subjected to the new law of *actual* damages?

This invention of a discrimination of damages raises questions which the contract furnishes no means of answering; and for the best of reasons, the contract raises no such discrimination.

Thus, suppose the vendees refuse to receive the increased amount, are they excluded *pro tanto* from the protection, (1) of *no* damages as to half and, (2) only liquidated damages for the excess?

Is the vendor exposed to actual damages when the market is high, and to lose its liquidated damages when the market is on a level with the contract, and the vendees refuse to receive?

Suppose there were a deficiency of 5,000 tons in June, and the election being notified, the amount deliverable in July is thus increased to 20,000 tons. Suppose, then, that only 18,000 tons are delivered, is the default on the 2,000 tons a default upon the June or July quantity? Must the vendor pay liquidated damages on this default, or will he get off with actual damages, if the market shows them less than liquidated?

Suppose that of an amount increased by election to 20,000 tons, only 10,000 tons are delivered. Does the delivered 10,000 or the undelivered 10,000 include the 5,000, which, as now claimed, are subject to the law of actual damages?

It is thus apparent that the contract never intended to

disturb the plenary disposition of the question of damages already secured. It is demonstrable that it never intended to introduce a partial or discriminating exceptional rule, for it has furnished no means to ascertain or apply the exceptional rule.

We have said that all the working clauses are to be construed in their meaning as parts of a contract, *as expected to be maintained*, though, of course, liable to casual defaults in performance. On the other hand, the subject of damages belongs to *broken* contracts; and when the contracts themselves include as one of their conditions a provision arranging and limiting the consequences of a breach, no qualification of the apparent comprehension of the clauses on *that* subject, can be tolerated by a reference to a clause that has only to do with a substituted performance.

It is respectfully submitted that the "*inconvenience*" which seemed to his honor, Judge Davis, so serious an objection to the vendor's view of this subject of damages, disappears upon a survey of the subject and the situation of the parties.

The accumulation of options by the vendees is wholly at their will, and they can have their liquidated damages whenever they please to insist upon them.

SECOND HEAD.

Supposing the vendees were entitled to recover actual, and were not limited to liquidated, damages, the rules laid down and the evidence admitted under them, and the instructions of the court to the jury, were contrary to law, and oppressive to the vendor in the highest degree.

I. It appears upon the record that, in the months of July, August, and September, the vendees refused to receive the greater part of the quotas for those months, and did not pay the liquidated damages for their default.

Now, under a general contract by which the vendor had receded from the coal trade with southern points, and turned over its whole coal fleet for such trade to these vendees, this open treatment of the contract by the vendees, as *a speculation in defaults*, and not a transaction of *bona fide* trade, gave great offense to the vendor. The contract gave a right to either party to annul the contract, upon default for two consecutive months; but, unfortunately, its misplaced confidence in these vendees had put the vendor at a disadvantage, the vendees being in possession of the coal fleet of the vendor.

Smarting under this injury, the president of the company wrote certain letters to the agent of the company, *never communicated to the vendees, or intended so to be during the transaction*, but afterwards laid open to them by this agent after leaving the service of the company.

These letters were read in evidence, but they were not pertinent to any issue in the cause, and were pernicious in their influence on the jury, and inflamed the damages.

The defendant, at the trial, had no evidence to meet them, nor was it in fault for not having. Had this extraneous issue been tried, the indignation of the jury might have been turned upon the vendees, as persistent and calculating defaulters under the contract.

The defendant is entitled to a new trial for the admission of this evidence.

II. The market at Grand Tower at the time of default in delivering furnished the legal measure of actual damages.

This was departed from, although the evidence showed sales there at the times in question and through the year at regular rates, and in the market between purchaser and wholesale buyers, which was the transaction of these parties.

There was error in the ruling of the court refusing to confine the defendants to this market.

But if the proofs in regard to this market had introduced

the exceptional right to resort to markets as near in locality and circumstances as might be, manifest error, in the scope allowed by the court, intervened.

Retail prices, by the barrel, in the markets, not of coal supply, but of distribution, was allowed to furnish the measure of damages to the jury, by the production of such dealers from Memphis and New Orleans who stated *abnormal* prices, which would have disappeared before the vendees had they carried this coal to market; for they grew out of its *absence*, in connection with the failure of the navigation of the Ohio river.

The vendees should have been confined to wholesale markets of supply from coal producers; and whatever necessary calculations to reduce to the true rule, to wit, market at Grand Tower, should have been made by the jury, under the instructions of the court.

In truth, the plaintiffs were suffered to recover, under the disposition of this question of actual damages by the court, speculative profits, measured by a retail sale by the barrel, and which never could have been gained by plaintiffs *with* the coal, they being prices obtained by these retailers by reason of the absence of this coal from the market.

The law excludes expected profits, unless in very special cases, and then requires them to be proved as probable and not conjectural.

In this case, profits *quâ* profits were not admitted, but the only effect of this was to liberate the plaintiffs from all restraints which would have confined them if proof of profits had been allowed.

III. The court allowed the plaintiffs to recover the actual damages for the non-delivery of the coal, thus putting them in the same condition as if they had received it, and *also* allowed them to recover in addition *liquidated* damages for

the detention of tow-boats, which was just so much of excessive or duplicate damage.

The tow-boats would have been detained, of course, if they had received the coal, or would have been used in transportation, which is the same thing.

The demurrage allowed in the contract is, (1,) a part of the scheme of liquidated damages; and (2,) for unnecessary detention in actual loading. It can form no part of damages when the case is put outside of the liquidated damages of the contract, and full actual indemnity is given in respect of the coal undelivered.

WM. M. EVARTS,
Of Counsel for Plaintiff in Error.

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Supreme Court of the United States,

OCTOBER TERM, 1874.

GRAND TOWER MINING, MANUFACTURING AND TRANSPORTATION COMPANY,

Plaintiff in Error,

VS.

WALTER M. PHILLIPS and DAVID L. ST. JOHN, Partners, &c.,

Defendants in Error.

IN ERROR.

To the Circuit Court of the United States

For the Southern District of Illinois.

Brief of Defendants in Error

— AND —

ARGUMENT OF WM. B. GILBERT.

Supreme Court of the United States,

October Term, 1873.

No. 884.

GRAND TOWER MINING, MANUFACTURING & TRANSPORTATION COMPANY,

PLAINTIFF IN ERROR.

vs.

WALTER M. PHILLIPS & DAVID L. ST. JOHN, PARTNERS, &c.,

DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, for the SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

I.

Defendants in error were coal merchants, largely engaged in supplying and selling coal at Markets on the the Mississippi river *below* Cairo, Ills. With headquarters at Memphis and also a coal depot at New Orleans, they *had* been operating under a contract with plaintiffs in error (*Rec.* 94, 109, 13, 22, 114.)

Plaintiff in error was and is a coal company having large coal mines at or near Grand Tower, Ills., on said River, 80 miles *above* Cairo. Its mines were named Mt. Carbon; its coal was of a distinct and pe-

culiar quality; there was none other like it in the country; it was called Mt. Carbon coal. Said company has the only mines in that locality; no coal was sold at Grand Tower, where these mines were located, except what said company sold; said company made the *only* market there was for coal at Grand Tower; and at that place, it fixed its own prices, raised and lowered them at pleasure and as its own interests demanded (*Rec.* 12, 94, 100, 107, 152).

December 15, 1869, Defendants in error, for the avowed purpose of carrying on and continuing the said coal business, *below* Cairo and to secure an ample supply of coal for that purpose, together with all the river stock before that time used by said company at Memphis, entered into a *new* agreement with said company, in and by which it was mutually stipulated substantially and to the effect following, viz:

FIRST.—(*Rec. p.* 12.); Said company agrees to sell and deliver to Defendants in error at its coal dump at Grand Tower, on board barges to be by Defendants in error provided, during the years of 1870, 1871 and 1872, 150,000 tons of coal, 'lump' and 'nut,' per annum, the products of its said mines, in equal daily quantities, through ten months of the year, commencing February 15th and ending December 15th in each of said years, (*Thereby giving a monthly quota of* 15,000 *tons for each calendar month excepting February and December in each of which the monthly quota would be only half the above quantity,*) the amount of "nut" and "lump" so deliverable to bear same relative proportion to each other that the "nut" produced at said mines bears to the "lump" so produced.

SECOND.—(*Rec. p.* 12, 13.); both parties mutually agree that Defendants in error shall *not* sell any of said coal above Cairo, but shall have the *exclusive* sale of all coal produced from the mines aforesaid, that is or shall be sold at and *below* Cairo.

THIRD.—(*Rec. p.* 13.); Said company agrees to lease to Defendants in error, its certain towboat, barges, tug, flats, tools, ropes, chains, etc., then at Memphis, (*where the company had its coal yard for the sale of this coal,*) at a certain per centum of their valuation, as rental therefor.

FOURTH.—(*Rec. p.* 14.); both parties agree upon mode of ascertaining said valuation—(*not material to this case.*)

FIFTH.—(*Rec. p.* 14. 15.); Defendants in error agree to purchase and receive said coal and to pay for same at rate of $3.00 per ton of 2000 pounds for 'lump' and $1.50 per ton for 'nut' coal, *during* 1870 (*etc., thereafter, which is immaterial to this case,*) with a *rebate* of 25 cents per ton on every ton delivered, provided Defendants in error shall provide barges. Settlement for the coal delivered and for said rebate and for said rental to be made monthly, and the balance due paid in cash or by paper acceptable to said company payable four months from *first* day of the months in which such settlement shall be made.

SIXTH.—(*Rec. p.* 16.); Defendants in error agree to rent said leased property at the price, etc., aforesaid, and keep the same insured and in repair.

SEVENTH.—(*Rec.* 16, 17.); Defendants in error agree, if not prevented by ice or low water, to furnish barges suitable and sufficient to receive said coal as aforesaid—the company to load the same without delay—delivery of barges to be complete when moored in good order alongside river bank at Grand Tower—delivery of coal to be complete when barge is loaded—and the company is to move the barges to and from its coal dump.

EIGHTH.—(*Rec.* 17.); both parties mutually agree that interruptions by accidents to company's railroad, floods at its mines, strikes of laborers, or other unavoidable cause, shall, during such interruptions, excuse said company from delivering coal.

NINTH.—(*Rec.* 18.); both parties mutually agree, that, if for any other than the unavoidable cause aforesaid and through no fault of Defendants in error, said company shall fail *in any one month* to deliver all or any part of *the quota of coal to which Defendants in error may be entitled in such month*, the company shall pay to Defendants in error, as liquidated damages, 25 cents for each ton which it may have so failed to deliver; *or instead thereof* Defendants in error *may elect to receive the coal* so in default *in the next succeeding month*, in which case the quota which the company would otherwise have been bound to deliver under this contract (viz: *the regular mouthly quota.*) shall be increased *in such succeeding month* to the extent of the quantity in default.

And further, (*Rec.* 19.), if without fault of Defendants in error and not in consequence of said unavoidable causes, the company fails to deliver its monthly quota of coal, as herein provided in regular daily quantities,

the company shall pay Defendants in error, *as liquidated damages*, $50 *for each day either of their towboats may be detained in consequence of such failure:*

And furtner, (*Rec.* 19.), if Defendants in error fail *in any month* to furnish barges to receive in regular daily quantities *the quota* which they are bound under this contract to receive. and if through such failure the company is prevented from delivering at least half of the *monthly quota* stipulated for herein, Defendants in error, for every ton less than half of *said quota*, which the company is thus prevented from delivery, shall pay the company 25 cents as liquidated damages :

And further, (*Rec.* 20.), if Defendants in error shall in any month fail to pay for *coal received*, and *the use of barges*, etc., (*viz : the said rental,*) or fail to pay *maturing obligations, as provided for herein*, (viz : said four months paper specified in article "Fifth," *above.*), the company shall be released from any obligation to make further deliverance of coal :

And further, (*Rec.* 20.); if either party shall *for the period of two consecutive months*, neglect to perform its engagements as herein set forth the party *not in default* shall have *the right* to declare this contract null and void and shall *thereafter* be released from further obligations in the premises.

TENTH.—(*Rec.* 20-21.); both parties mutually agree that said leased property shall be returned in good order, etc., to the company, or in default thereof the company may take possession thereof and recover from Defendants in error whatever damages the company may have suffered by reason of the improper use or detention of the property.

ELEVENTH.—(*Rec.* 21.); both parties agree to a certain deduction on the valuation on said leased property, as the price to be paid therefor, in case the same is sold by Defendants in error—not material to this case !

TWELFTH.—(*Rec.* 22.); both parties agree that this contract shall have no force until Phillips shall give said company a certain note on account of coal before then purchased; and, if Phillips fails to pay the note at maturity, said company's obligations to deliver coal shall cease and it shall have the right to declare the contract void.

II.

The present suit was an action of covenant by Defendants in error against said company upon the said agreement which was in writing under seal.

Conclusion to declaration (Rec. 28) is in usual form and claims damages in sum of $200,000. It contains a *first* and *second original* count, and *first*, *second* and *third additional* count. The first additional count was intended to enforce that construction of the agreement contended for by counsel for said company, (viz : the rolling up of quotas month after month to end of contract) was held bad by the court and counsel for Defendants in error and by *the latter* withdrawn, and has no bearing in the case. The four remaining counts are, in substance, as follows:

FIRST ORIGINAL COUNT.—(Rec. 3 to 11.)—*Avers :* execution, etc., of said agreement, profert of which is made, and its provisions, material to the breach alleged, set forth. It further *avers ;* execution by Phillips of note specified in Twelfth clause of agreement ; payment thereof at maturity, and full performance by Plaintiffs of all *their* covenants ; that the company did not deliver the monthly quota, to-wit : 15,000 tons of coal due and to be delivered according to said agreement during the month of October 1870, though requested and though not during said month interrupted by any unavoidable cause as mentioned in eighth clause of the said agreement, or prevented by fault or default of the Plaintiffs and although Plaintiffs had provided suitable barges sufficient to receive said monthly quota in equal daily proportions moored in good order alongside the river bank at Grand Tower and kept the same so moored during all said month and were ready and willing to accept and pay for said monthly quota ; that Plaintiffs thereupon elected to take said 15,000 tons of coal in the next succeeding month of November, and so notified said company November 1, 1870, and furnished and delivered to said company barges, moored in good order alongside the river bank at Grand Tower, sufficient to receive in equal daily proportions the said quotas of October and November, and kept the same so moored during November and were ready and willing then and there to accept and pay for said October and November quotas ; that said company, though not prevented by fault or default of Plaintiffs nor interrupted by unavoidable cause, (etc., aforesaid) did not deliver during November either said October or November quota or any

part thereof; that, though November has long since passed and Plaintiffs during all of November and thence forward hitherto have been ready with barges, suitable and sufficient and moored as aforesaid, willing to have accepted and paid for said October and November quotas, viz: 30,000 tons of coal, yet said company had hitherto refused, etc., that according to the true intent of said agreement said coal so to be delivered was to be sold at points at and below Caire; that the Plaintiffs by means of the premises, have been deprived of all benefits and profit they would have acquired from the performance by the company of its said covenant to deliver said coal and they further say that after November and before suit they could have sold said coal in regular course of trade at a profit of $9.00 a ton; and, by reason of company's non-performance of its covenant to deliver said coal in November, their certain barges, etc., viz: 2 tow and 2 tugboats were kept idle, the use of which was worth $10,000; and they have lost $10,000 by damage to said vessels by reason of said non-user; and they have paid $5,000 in watching said vessels while so unused.

SECOND ORIGINAL COUNT—(Rec. 11 to 29.) is substantially the same as said first original count except that it sets out *the agreement* in *haec verba*; and also (Rec. 28) makes specific claim for liquidated damages of $50 a day for detention of Plaintiffs towboats during October and November, to-wit: $10,000, which Defendant has not paid.

DEMURRER was filled by Plaintiffs in error, to said first and second original counts, argued, taken under advisement, and over ruled, (Rec. 29½, 30); and Plaintiff in error, having afterwards plead thereto, no error is assigned for overruling said demurrer.

SECOND ADDITIONAL COUNT (Rec. 49 to 54)—avers; execution, etc., of said agreement; giving of said note and payment thereof at maturity by Phillips; the providing of barges suitable, etc. to receive the monthly quota of 15,000 tons of coal deliverable in October, 1870, and the keeping of the same moored, etc., at etc. during all of October, and readiness, etc., to receive and pay for said coal; the failure of said company during October to deliver said October quota, though not interrupted

by accident, etc., or other unavoidable cause, or prevented by fault or default of Plaintiffs; the election to take said October quota of 15,000 tons in the next succeeding month of November and notice thereof to said company; the providing of barges suitable, etc., moored, etc.. at etc., during all of November to receive both said October and November quota, and readiness, etc., to receive and pay for the same; the failure of said company to deliver during November, or at any time, the said 15,000 tons so carried over from October to November, though not interrupted by accident etc., or other unavoidable cause, or prevented by fault or default of Plaintiffs. This count then further avers full performance of said agreement, etc., at all times, etc., by Plaintiffs; and that by means of said company's failure to deliver said October quota of 15,000 tons in November, said company's covenant became broken and Plaintiffs were prevented from realizing great gains and profits which they could have made from the delivery of said coal.

Could have made $20 net profit thereon—incurred expense in keeping barges, towboats and men idle during November--expended money because of injury to boats and barges by their remaining unused—and by reason of said company's defaults in this count mentioned they have been damaged $200,000

THIRD ADDITIONAL COUNT.—(Rec. 54 to 59.)—*Avers:* execution, etc., of said agreement; the full performance by Plaintiffs of *all* things to be by them performed under said agreement; the providing of barges suitable, etc., to receive the monthly quota of 15,000 tons of coal deliverable in November 1870; the keeping of said barges moored, etc, at etc, during all of

November, and readiness, etc., during all of said time to receive and pay for said coal; the failure of said company during November to deliver said November quota, though not interrupted by accident, etc., or other unavoidable cause, or prevented by fault or default of Plaintiffs; the election to take said November quota of 15,000 tons in the next succeeding month of December; to-wit: on or before December 15, 1870, that being the last day on which coal was deliverable under said agreement; notice to said company of said election; the keeping of barges moored, etc., at etc., from December 1st to 15th both inclusive, suitable, etc., to receive, etc. said November quota of 15,000 tons so carried over from November to December, also the December quota; the readiness, etc., to receive and pay for said November quota of 15,000 tons in December; the failure of said company to deliver during December said November quota so carried forward to December, though not interrupted by accident, etc., or other unaviodable cause, or prevented by fault or default of Plaintiffs. This count then further avers that so said company has broken said covenants in manner aforesaid—Plaintiffs, on and after December 15, 1870, could have sold November quota of coal, south of Cairo at a profit of $15 per ton, but were deprived of said profits by reason of said company's said failure so to deliver said coal—were also put to expense by being compelled to keep barges and transports idle and men to take care of them and to pay for repairs thereto by reason of such non-user—and by reason of said failure, etc., of said company, Plaintiffs sustained damage in the sum of $200,000.

III.

After said two original counts were filed, and *before* filing of said additional counts, said company filed its first plea (Rec. 31.) as follows:

1. "And the said Defendant, by Thos. G. Allen, its attorney comes " and defends the wrong and injury, when, etc., and says said Plaintiffs " at the time when, etc., *did not furnish and deliver* to Defendant *barges* " moored in good order alongside the river bank at Grand Tower, suita- " ble and sufficient to receive in equal daily proportions, the said quotas " of coal, as said Plaintiffs in their said declaration have alleged. And " of this said Defendant puts itself upon the country, etc."

Issue was joined on this plea, and it formed the *only* issue before the jury; and upon *this* issue *alone* was the case tried.

2. The only *other* plea *material* to this case and in respect to which error is assigned, is said company's *fourth* plea, filed *same time* as said first plea; to-wit: It (Rec. 33 to 38.) assumes to answer the entire declaration, and, after craving oyer of the agreement sued on, and making profert of a supplemental contract (*immaterial to the present case,*) in substance *avers:* failure of Plaintiffs to furnish, during *July, August and September*, 1870, barges, etc., sufficient to receive, etc., the monthly quotas of coal for those respective months, though the river was not obstructed any time during said months; the prevention of the company, through said default of Plaintiffs from delivering in each of said months a large portion of said coal, viz: 12,099 tons in July, 10,370 tons in August, and 13,947 tons in September; and that during all of October and November Plaintiffs remained indebted to the company in the sum of $6,000 for *liquidated* damages *"by reason of their said fault in so preventing said company from delivering as aforesaid*, less than one half of said respective quotas, by reason whereof said company was released from any obligation and was not bound to make deliveries of coal during *October* and *November*, 1870; concluding with verification.

3. The only *other* pleas filed were 2d, 3d and 5th pleas (Rec. 32, 39, 40,) to orignal counts, and three pleas (Rec. 60, 62, 67,) to said additional counts. These pleas are not material to the case, except that they are

admitted to be *bad.* Demurrers were filed and sustained to all of them including said 4th plea before mentioned, special cause Demurrer to said 4th plea being that it was "double and uncertain." (Rec. 84, 85, 86, 87.)

IV.

The only errors complained of arising upon the pleadings are: 1st. That Plaintiffs' demurrer (to pleas filed to original counts) ought to have been carried back to *both* said original counts; and Plaintiffs' demurrer to pleas filed to additional counts ought to have been carried back to *both* said additional counts.

2d. That said demurrer to 4th plea ought not to have been sustained.

These alleged errors are assigned as Errors No. 1 and 2. (Brief of Plaintiff in error, p. 39 and 40).

V.

The *only issue* for the jury to try, being *the readiness and ability of Plaintiffs to receive in daily proportions the coal in question,* viz: whether or not they had barges moored, etc., alongside the river bank at Grand Tower, suitable, etc., to receive said coal; Plaintiffs to maintain said issue, proved (*outside of and in addition to the evidence objected to*) as follows, viz:

DAVID L. ST JOHN testified: that (Rec. 94.), from October 1st to the middle of December, 1870, Plaintiffs had in their possession for receiving coal at Grand Tower and transporting same to Memphis 35 to 38 square barges with carrying capacity of 450 tons each, 15 monitor barges with capacity of 700 to 750 tons each and two *towboats* for moving same; (*viz: tonnage enough to receive, etc., nearly* 30,000 *at once.*) on October 1st

Plaintiffs had at Grand Tower tonnage sufficient for over 2,000 tons, viz: 3 square barges *empty*, and one monitor, and two square barges *partly empty;* (Rec. 96.) took 3 days to take coal fleet from Grand Tower to Memphis and 4 days to return; Plaintiffs could unload a barge a day and more in a busy time; required 2 days to tow barges from Grand Tower to Cairo.

WALTER M. PHILLIPS, testified: (Rec. 105, 106), that in October, November and December, 1870, the coal fleet under control of Plaintiffs was about fifty barges; they were used to transport coal from Grand Tower to Memphis and New Orleans; on the 11th of October, 1870, Plaintiffs had 12 barges at Grand Tower; the capacity of these barges was about 5,500 tons—3 barges 750 tons each and 9 barges 450 tons each; on the 14th of October, 5 more barges were added; these barges remained there all through November and December; they were brought there in a condition to receive coal; knew them to be in good condition; (Rec. 108.) had conversation with Olyphant, president of said company, October 11th—Plaintiffs had received no coal and went to see him about it—asked him why Plaintiffs did not get coal and he gave no satisfaction and would not discuss it; the mines were in operation and the Plaintiffs' barges were there and *Olyphant knew they were there and made no objection* "that Plaintiffs had no barges there;" the conversation wound up by Olyphant saying that *when Plaintiffs' barges were loaded* they would know whether they were to have any coal or not; witness replied to him that "their barges were there *ready to receive it;*" monitors carried about 750 tons —square barges 450 tons; *all were in good condition*; 11 of them were half mile below the dump at regular landing, and the others three-fourths of mile above; in said conversation witness gave Olyphant a written demand for coal and he made same answer to verbal and written demand.

P. D. PRATT, testified (Rec. 114): that he was agent of Plaintiffs, at Grand Tower, in management of barges

and boats, superintending loading barges, running towboats and moving coal to Memphis and New Orleans; left Grand Tower for Memphis September 27th, 1870—when he left there were three barges scarcely half filled with coal and three more empty; returned to Grand Tower October 4th, and found the same barges there in the same condition as he left them; asked Driggs, the Superintendent of the Company, to fill up the barges, and he replied he could not give Plaintiffs any coal that week. (Rec. 115) On 14th of October Plaintiffs had five square barges with capacity of 450 tons each and two monitor barges of about 700 tons each, brought to Grand Tower by towboat on night of 14th and moored to the landing; for some time he had demanded coal every day, Driggs evading an answer; Driggs then agreed to accept demand as made every day without his coming in every day; Driggs knew the barges were there and had spoken to him of these particular barges; on the 27th of October he thinks three monitors and two additional square barges came up, making in all sixteen or seventeen then at Grand Tower; Plaintiffs had other barges at Memphis, Cottonwood Point and Cairo; he had looked at them to see their condition and know what he could depend on; 10 of them could have been brought to Grand Tower in 24 hours; those at Cottonwood Point in 48 hours; Plaintiffs had two towboats; company could load 1,200 to 1,400 tons per day; said barges at Grand Tower were moored a few hundred yards below the dump at a place provided by said company; were brought up to the dump by company's towboat when they were to be loaded; the company had always done that; the *barges* so moored *were in good order to receive coal*, some of them right new. Driggs never objected to giving Plain-

tiffs coal because their barges were not ready to receive it; these barges (Rec 117) *remained* there ready to receive coal until March; the last barges were brought up October 14th, instead of 27th, as first above stated.

J. W. BUKUP testified: (Rec. 124) that he was in Plaintiffs' employ at Grand Tower in October, November and December, 1870, as assistant with, and subordinate to Capt. Pratt; superintended loading of barges and repairs; Plaintiffs had 15 monitors and 35 square barges under their charge and service, transporting coal from Grand Tower to market; October 1st to December 15th, 1870, they were at Grand Tower, Island 18, and Memphis; October 1st, there were 3 partly loaded and 3 empty at Grand Tower; they had a fleet of 27 at Cairo subject to their control; 7 of those, 5 square and 2 monitors, were brought to Grand Tower October 7th; 3 more square barges and 2 monitors were brought there October 14th; *all of those barges* remained at Grand Tower until March, *and were in a condition to receive coal and were moored at the river bank at Grand Tower;* capacity of square barges was 460 tons of coal, monitors 700 to 750 tons; balance of fleet was about 160 miles from Grand Tower; would have taken 48 hours to have reached Grand Tower; Defendant could load 2 barges a day; Plaintiffs demanded coal by Agent, Pratt, on or about October 1st and by witness October 4th, etc.; got no coal October, November or December; 3 barges there, partly loaded, October 1st., one of which was so partially loaded last day of September; reason why they were not fully loaded was that Defendant declined putting in any more coal.

H. R. DRIGGS, superintendent of Defendant, testified: (Rec. 142) that Plaintiffs demanded coal of him

in October; thinks the demand was made by Pratt; did not get any coal *for the reason* that witness did not give it to him; has no recollection of making any such objection as that "there were not barges enough to receive it;" there *were* some coal barges there; thinks they remained there through the fall; Pratt made a demand for coal last day of September; then October 1st for October coal; then came every day for awhile and demanded coal until it got to be so ridiculous witness considered it a useless formality; *were monitors and square barges of Plaintiffs there—17 in all—at least 14 of them suitable for holding coal*—other three needed some repairs he thinks; he was Defendant's general superintendent, in charge of its business at the time in question (Rec. 128, etc).

2. Plaintiffs in error introduced *no evidence at all*; nor was *any* of the above recited evidence *objected to*, nor is there any error assigned in regard thereto.

3. *In addition* to the above recited testimony *not* objected to, Plaintiffs below, for the purpose of strengthening said testimony in case of attack by Defendant below, and as *tending* to prove the said issue, viz: the *readiness and ability* of Plaintiffs to receive the coal, also introduced certain other evidence which was objected to by Defendant, but admitted by the court, viz:

1st. STATEMENT OF MR. ST. JOHN, (*Rec.* 95) that "*there were* 27 *barges at Cairo*, 14 *at Memphis, and some* 10 *or* 12 *at New Orleans, immediately under the control of Plaintiffs.*" Also statements of same witness (*Rec.* 97) in regard to a conversation had between himself and the president of said company, October 31, 1870, in regard to delivery of coal; wherein the former demanded coal and the latter refused *because* certain boat bills, *outside the agreement and against which Plaintiffs had*

a counter claim, were not paid, (and *not* because Plaintiffs were *not ready* and *able* to receive it)—the admitting in evidence of which said statements is assigned as ERROR NUMBERED 3. (*Brief of Plaintiff in Error*, *p.* 40.)

2d. Four certain letters, written and signed by the president of said company, and duly identified and proven (Rec. 126-141) by Mr. Driggs, the company's own superintendent, and to him addressed, and by him received, which letters contained the following statements and admissions on behalf of said company, through its said president, to-wit:

FIRST LETTER, (Rec. 136), dated September 1st, 1870—"We must "put up the price of coal to transient customers at Grand Tower to $4.50 "per ton. * * Hurry up a * * settlement with Phillips and St. "John and deliver them no more coal without my orders. I want to get "all out of them I can before the rupture."

SECOND LETTER, (Rec. 132), dated September 10th, 1870—"I feel "more than ever anxious to put an end to the contract with Phillips and "St. John. One difficulty in the way is they have possession of our "river fleet. This * * we could reach by replevin * * The "other is * * they will * * sue us for damages, if we decline to "deliver the coal. This makes it important that we should, if possible, "place them in the wrong before we take the decisive step. But we can "not afford to wait long. * * But if they beat us what damage "could they show? Up to this time they have lost money. * * "measure of damages would be only the difference between the contract "price * * and what they might have to pay for other coal of equal "quality. * * If I am right * * take prompt measures to get "hold of our river property * * ; then notify them of our purpose "not to deliver any more coal to them. Having this in view I would hold "on to any barges loaded for them this month, without coming to an "actual rupture, * * In other words, get all the money you can first; "then get the river stock, * * that accomplished throw them over-"board, *and let them sue*. See Col. Allen at once * *. Ask him how "long we could fight them, if they should sue us for damages."

THIRD LETTER, dated September 30, 1870—" * * Phillips and "St. John's account you may may leave, though I see little to be gained "by delay. *Contract or no contract, they will get no more coal from us.*

"The court may award damages but Phillips and St. John will have to "encounter a large expense of time and trouble before they get "them, * * ."

FOURTH LETTER, (Rec. 139) dated December 13, 1870—" * Ad- " vise Phillips and St John with regard to their bill for *steamboat* " *detention in October* that we place the amount, *supposing it to be right* " to their credit in account. Do same with their bill for *November* " when rendered. * * *In the matter of the Phillips and St John* " *controversy we have got ovr foot* in and it is idle now to be squeamish. " * * our policy is to *run some hazard and take the bull by the horns.* " * * You of course understand that under our contract our obliga- " tion to deliver coal to Phillips and St John is suspended between the " 15th December and 15th of February. * * we will continue sub- " scription to the *minister* as heretofore."

At the time said letters respectively were admitted into evidence *the court charged the jury* that said letters had "no application unless they believed from the reading that they had a subsequent bearing," (*Rec.* 131); that they were "not to regard anything but what related to the delivery of coal in the months of October, November and December, 1870," (*Rec.* 135, 141).

Cousel for Defendant objected to said letters "because they were not addressed to Plaintiffs and did not tend to prove the issue and were irrelevant and improper,"(*Rec.* 130, 135, 136), and the overruling of said objection is assigned as ERROR No. 5. (Brief of Plaintiffs in error page 40.)

3rd. During *cross-examination* of Mr. Driggs, (*Rec.* 148 149), the witness having *already* answered Defendant's counsel that he *could not tell* 'under what circumstances said correspondence from Olyphant was given or about the difficulty with Phillips and St John about the time those letters were written and previous to it," counsel immediately asked "Don't you know that Phillips and St John have been bothering the company?" Plaintiffs objected, the court (remarking "the letters show the circumstances under which they were written sufficiently") excluded said question—and for this, viz: the making of said remark by the court and excluding of said question, is assigned ERROR No. 7. (Brief of Plaintiffs in error p. 41.)

The above are the only errors assigned in respect to evidence so far as pertains to the said issue before the jury.

VI.

IN MATTER OF ASSESSMENT OF DAMAGES: Defendant offered no evidence whatever. Plaintiffs proved, in substance, as follows, by the following witnesses, to-wit:*

DAVID L. ST JOHN: (Rec. 94), Plaintiffs' headquarters for receiving coal, at time of making contract in question, was at Memphis; received at Grand Tower and shipped to Memphis; Plaintiffs also (Rec. 101) had coal depot at New Orleans; Plaintiffs (Rec. 100) could have supplied themselves with the kind of coal in question only from Defendant; no other mines in that vicinity; quantity of coal in question could not be had elsewhere at that time (November and December, 1870); no means of getting coal from up Ohio river, which was low and supply ran out; not navigable for coal boats in seasons of drought and ice, and that was its condition October, November and December 1870; no mines near its mouth where such quantity could be supplied from; *price of coal at Memphis was, in October,* $7 to $10 *a ton; first part November* $7 to $11 *a ton; latter part November* $12.50 to $15; *this was for Pittsburg coal; Defendant's coal ruled* $1 *less; to transport coal from Grand Tower to Memphis cost* 33 *cents a ton: to New Orleans* 35 *cents.*

(Cross Examined, *Rec.* 102.) Witness, during time in question (October, November and December) was at Memphis part of time only; was in New York the latter part of the time; was not at Grand Tower and did not enquire (*Rec.* 103) the price there; only wished to know prices below, because there was where he traded.

WALTER M. PHILLIPS, (Rec 107): no mines at Grand Tower but defendant's mines; Defendant makes

*NOTE.—No error is assigned on account of any of this evidence except that in ITALICS.

the only market there is there for coal; quantity of coal in question could not have been bought within 100 miles of Grand Tower at time in question ; could not be had at Cairo ; no coal could be had there but at retail ; no coal markets but retail markets at Cairo, between Grand Tower and Memphis : *market value of coal per ton at Memphis was, in October,* $7 *to* $10 ; *early in November advanced* $10 to $15 *and retained these prices until sometime after December* 15, *when there was a decline to* $12 50 ; *cost of transporting coal from Grand Tower to Memphis was* 25 *to* 35 *cents a ton* ; Ohio was not navigable for coal boats October, November and December ; none arrived at Memphis during that time, excepting 3 or 4 loaded very lightly in December ;

Plaintiffs (Rec. 109) *had been* (previously to contract in question) *in business at New Orleans under a contract with Defendant.*

(Cross Examined, *Rec.* 110.) Mississippi at good stage of water during said time ; prices of coal mentioned were for quantities of 100 to 150 tons ; Plaintiffs sold some of Defendant's coal in October ; the last early in November, at $14 a ton ; very little coal in market then in consequence of low water in Ohio ; was no coal of the kind in question below Memphis ; high prices were owing to low water and short supplies ; coal sold at Memphis during said time was lump coal ; very little nut coal there ; nut coal sold $1 or $1.50 a ton less ; (Re-examined *Rec.* 113) ; Defendant's coal rated $1 a ton less than Pittsburg ; is used for all consumption it is, sells as readily and in some markets more readily for $1 a ton less ;

R. A. Speed, coal merchant at Memphis, (Rec. (164): *price of Pittsburg coal at Memphis was, in October* $6, $7 *and* $10 ; *in November, 5 days* $8 to $11, *then* $8.50 *and* $9 to $12 50, *then* $10 to $15 ; *the last named prices continued until January; Grand Tower coal sold for* $1 *a ton less than Pittsburg and just as saleable at thatprice.*

(Cross-examination, *Rec.* 166.) Pittsburg and the Ohio river coal (including Grand Tower coal for past 2 years) supplies the Memphis market; said high prices were occasioned by a scarcity of coal and prices went down as soon as Pittsburg coal arrived;

P. D. PRATT (Rec 118): Defendant's mines produce one ton of nut to 10 of lump coal; no other mines in that vicinity; 12 years acquaintance with the Ohio river and boated all his life; invariably low in summer and early fall, and then coal can't be transported; none came out of it in October, November and December, on account of low water and closing canal at Louisville; low stage comes so regularly that it is calculated in coal business; *cost of transporting coal from Grand Tower is* 30 *cents to Memphis and* 50 *cents to New Orleans; less under favorable circumstances*; Plaintiffs' two towboats were laid up idle about 48 or 50 days—one brought up some barges Oct. 14 and did no work after that—the other was there from Oct. 1st—both remained there until after December—Plaintiffs kept hands, men and officers on the boats to take care of them.

(Cross-examined, *Rec.* 122.) Defendant delivered coal to boats and St. Louis furnaces in October, November and December; doesn't know the price except from hearsay; unusual for Ohio to remain low so long; generally have coal-water last of October and 1st November; Mississippi river was at its usual stage;

H. R. DRIGGS, Superintendent of Defendant (*Rec.* 144) was asked by Plaintiffs' counsel "*whether he recollected of an application having been made for a small quantity of coal to get Grand Lake* (Plaintiffs' tow-boat) *out of danger or to move her somewhere?*" and by the court "*Did they refuse any portion of coal?*" to which questions witness answered "I believe they did sir; but I think they made the demand of some one else besides to me." Witness further testified on cross examination, (*Rec.* 150) that he made sales of coal for Defendant October, November, December at Grand Tower, $3.50 per ton to Memphis Packet Company and St. Louis furnaces, and $4 to outside boats, for lump coal, and $2 to $2.75 for Nut coal; Packet company took about one half of what was sold.

(Re-direct examination). Said sales to Memphis Packet Company and St. Louis furnaces were under contracts made January 1st and running through October, November and December; no coal was sold at Grand Tower other than the coal sold by the company (Defendant); when witness received instructions to put coal up he did not do it—thought it would not be policy—three-fourths were under contract—couldn't raise price only on small portion; could have got more than $4 if he had put up price; coal was very scarce—only small quantities for sale (anywhere).

W. J. WILMONT, coal merchant at New Orleans (Rec. 154): *coal at New Orleans is sold altogether by the barrel;* 180 *pounds to the barrel; price of coal there in October was* $1 *a barrel for Pittsburg coal; in November it was* $1.25 *a barrel;* $12.50 *for* 1,800 *pounds;* viz: $13.89 *per ton of* 2,000 *pounds; price advanced to* $2 *a barrel towards last of December,* reason was scarcity of coal; No Pittsburg coal arrived till February. (Question) *"State whether the coal market on the 'Mississippi is subject to fluctuation owing to variations "in stages of the Ohio river?"* (Answer) *"Yes sir."* (Question) *"Do business men make calculations with reference to these variations?"* (Answer) "Yes sir." Relative value of Grand Tower coal in New Orleans market was $1 a ton less than Pittsburg. Low stage of water and dearth of coal was much longer this season than usual; usually have a rise in November; this season it failed until January; dosn't know cost of transporting coal only from Louisville.

(Cross-examined *Rec.* 157.) what he said about sales at New Orleans in October, was his own sales; he sold at said prices; sold as

high as 2,000 bushels a day, some days; his were retail sales; sold 1,500 barrels, one day; was in November; that sale was to steamboat Belle Lee; sold every day more or less; don't remember number of tons sold; knows of sales made by other coal dealers; all sold at same price; in usual times 8 or 9,000 bushels coal arrive in New Orleans daily; supply that much less in October than in preceding month; lessening in usual supply was in same proportion in November, 1870; low water caused the decrease;

(Re-examined, Rec. 159); no difference in price between large and small quantities; 15,000 tons could not have been purchased in New Orleans; that much there, but it was sold by retail dealers; (Re-cross-examined Rec. 160) if 15,000 tons had arrived in October, or November it could easily have been sold; had it been 30,000 tons, price would not have been what it was; quantity in market regulated the price.

CHAUNCEY TYLER, also a coal merchant in New Orleans, (Rec. 161). *Coal sold in New Orleans, October 1st to November 18th at* $1 *a barrel; November 18th to December 1st at* $1.25; *December 1st to January 1st at* $1.50; *a little lower in small than large quantities, until coal got scarce, and then it made little difference; high prices continued till rise in river in February; sold* 400 *barrels December 5th at* $1.50 *a barrel: witnesses' largest sale, because coal was scarce; large quantities couldn't be got: could have sold if he had it.*

(Cross-examined, *Rec.* 163); prices referred to were for Pittsburgh coal during October, November and December; witness purchased no large quantities, except in November; bought some then at $14 a ton.

2. No error is assigned in respect to *any* of above evidence excepting that in ITALICS as aforesaid, to-wit:

FIRST:—Said statement of witness Phillips that "*Plaintiffs had been in business at New Orleans under a contract with Defendant*" admit-

ting of which in evidence, because "*irrelevant to the issue*" (*Rec* 109), is assigned as error numbered 4. (Brief of Plaintiffs in error p. 40.)

SECOND :—Said question asked witness Driggs "*whether he recollected of an application having been made* (by Plaintiffs to Defendant) *for a small quantity of coal to get* (their boat) *Grand Lake out danger?*" —the allowing of which question because (*Rec.* 144) "*irrelevant to the issue,*" is assigned as error numbered 6. (Brief of Plaintiff in error p. 41.)

THIRD :—Said questions asked witness Wiimont " *Whether the coal market on the Mississippi is subject to fluctuation owing to variations in the stages of the Ohio river?*" and " *Do business men make calculations with reference to these variations?*" which questions were objected to (*Rec.* 155) for matter of *substance*, viz : *because* "*the testimony sought was irrelevant to the issue*," and the overruling of these objections are assigned as errors numbered 8 and 9. (Brief of Plaintiff in error p. 41.)

FOURTH :—Said testimony, *italicized* as aforesaid, "*in regard to the price of coal at New Orleans and Memphis and the cost of transportation of coal to those places from Grand Tower.*" —to which testimony, and the questions which elicited it, the *only* objection assigned by Plaintiff in error was (*Rec.* 99, 106, 119, 154, 161 and 164) that the contract sued on determined amount of Plaintiffs' damages, (viz : liquidated damages), and that it was "*improper and inadmissible for Plaintiffs to introduce any evidence as to the price of coal at Memphis or other places, or in relation to any other matter not pertaining to the issue joined and the terms and conditions of said contract;*" which objection, being overruled by the court, is now assigned as error numbered 10. (Brief of Plaintiff in error p. 42.)

These are the only errors assigned in regard to the evidence, admitted or refused, upon the assessment of damages.

VIII.

IN THE MATTER OF INSTRUCTIONS : Given and refused, lie the only remaining "errors assigned" in this case, (not before mentioned) to-wit :

FIRST ; Defendant asked the court to charge the jury (Rec. 167-170) in substance and effect as follows, viz :

1. The jury are only to enquire and decide two questions : (1)

Whether or not Plaintiffs did have barges moored, etc., at etc., suitable, etc., to receive the coal; (2) If they so found "*then, from the evidence and the law applicable, as given by the court,*" they were to estimate Plaintiffs' damages; but if they did not so find their verdict should be for Defendant.

2. The jury must disregard all statements made by the witnesses and all written evidence which does not relate to, prove or tend to prove, "the delivery of barges *and* the special damages as is alleged in Plaintiffs' declaration."

3. The jury must not regard as evidence any statement made, sent or given by Olyphant to Driggs, declaring that Plaintiffs should have no more coal, unless it is proved that Defendant *authorized* such statement *and* also authorized Driggs to communicate it to Plaintiffs *and* that Driggs did *make it known to Plaintiffs* after he was so authorized.

4. The law will not admit it to be presumed that a contract under seal of a corporation has been disregarded or broken, because of a written declaration of its president that it intends to disregard such contract.

5. If the jury find for the Plaintiffs, the damages must be assessed "*in conformity with the provisions and conditions stipulated and set forth in the contract.*"

The court refused to give said charge as asked; and thereupon defendant excepted generally (Rec. 170) to this "decision of the court in refusing to instruct the jury as prayed by Defendant": and upon this exception taken is based assignment of error numbered 11. (Brief of Plaintiff in error, p. 42).

SECOND: The Court then charged the jury, in substance and effect, as follows, (Rec. 170-175) to-wit:

By the terms of the contract defendant was to furnish and deliver to Plaintiffs, on board suitable vessels, at Grand Tower, 15,000 *tons of lump and nut coal, the prodact of its mines, during each of the months of October and November,* 1870, *in equal daily proportions, as near as might be.* The amount of nut coal to bear the same proportion to the amount of lump coal, that the amount of nut coal prepared for market by Defendant bears to the whole amount of lump coal produced from its mines. *The price of coal to be at the rate of* $3 *a ton for "lump" and* $1.50 *a ton for "nut" coal. Plaintiffs to furnish and deliver to Defendant suitable vessels sufficient to receive the*

coal in equal daily proportions during said months. Should Defendant fail to deliver the quotas of coal for either of said months, Plaintiffs might elect to have that quota delivered during the ensuing month. The contract provides that Plaintiffs shall have the sale of all coal produced from Defendant's mines for sale and delivery at and below Cairo, and that Plaintiffs shall not sell any of the coal to be used at any place north of Cairo; also that in case of the failure to deliver the monthly quota in regular daily proportions, Defendant should pay Plaintiffs, as liquidated damages, $50 for each day that either of their towboats should be detained in consequence of such failure. Plaintiffs allege that they were ready, at Grand Tower, during the month of October, 1870, with suitable vessels, to receive, in equal daily proportions, 15,000 tons of coal, but that Defendant failed to deliver it; that Plaintiffs thereupon elected to have the same delivered during the ensuing month of November, and notified Defendant of such election, and were ready at Grand Tower during the month of November, with suitable vessels to receive said coal in equal daily proportions, but Defendant failed to deliver the same.

Plaintiffs make same allegations as to their readiness to receive the November quota, failure of Defendant to deliver same, Plaintiffs' election to have that quota delivered during the ensuing month of December, and notice to Defendant of such election; Plaintiffs' readiness and ability during the month of December to receive the November quota, and failure of Defendant to deliver the same.

Plaintiffs also allege detention of their towboats at Grand Tower during October, November and December, 1870, in consequence of Defendant's failure to deliver the coal.

Defendant only puts in issue Plaintiffs' allegation of their readiness and ability to receive, in daily proportions, the October and November quotas of coal.

Failure of Defendant to deliver coal, election of Plaintiffs to have October quota delivered during the ensuing month and notice thereof to Defendant, and Plaintiffs' election to have November quota delivered during the ensuing month and notice thereof to Defendant, are admitted by the pleadings.

"If the jury believe from the evidence that Plain-
" tiffs during the month of October 1870, at Grand
" Tower, were ready, with suitable and sufficient vessels
" to receive in equal daily proportions, the quota of coal

" for that month; and that they were also ready at " Grand Tower, with suitable and sufficient vessels during " the month of November, 1870, to receive in equal daily " proportions, the quota of coal for the preceding month, " then Plaintiffs are entitled to recover; and *the true mea-* " *sure of damages is the cash value during November*, 1870, " *of the kind of coal mentioned in the contract, at Cairo, or* " *points below it on the Mississippi river, after deducting* " *the contract price of the coal and the expense of trans-* " *porting it thither, and making due allowance for the* " *risk and hazard of such transportation.*"

"If the jury come to the same conclusion respect- " ing the November quota of coal, then *the measure of* " *damages, as to the failure to deliver that quota of coal* " *will be the cash value of the kind of coal mentioned in* " *the contract, in December* 1870, *at Cairo, or points south* " *of it, on the Mississippi River, after deducting therefrom* " *the cost of the coal.* (viz: its contract price as just " before stated) *and the expense of transporting it* " *thither; and making due allowance for the risk* " *and hazard of such transportation.*"

"If the jury believe from the evidence, *that Plain-* " *tiffs' towboats, without any fault on their part,* " *were detained at Grand Tower, during the* " *months of October, November and December,* " *1870, in consequence of the failure of Defendant* " *to deliver coal under the contract during those* " *months, then Plaintiffs are entitled to recover at* " *the rate of fifty dollars for each day that either of* " *their towboats was so detained.*"

Defendant excepted at the time:

FIRST, (*Rec* 175), to *the whole* of said charge "*as being an improper and misleading direction and instruction,*" without stating *wherein* it was

improper and misleading; which exception is the basis of error assigned as number 12. (Brief of Plaintiff in error, p. 42).

SECOND, (*Rec.* 176), to *all* that part of said charge, in *italics* as aforesaid, that relates to *the true measure of damages* for non delivery of October quota in November; *because* (and this was the *only* ground of exception announced to the court) "*the contract fixed the rule of damages, and the charge in respect thereto, should have conformed to that rule*" —which exception is the basis of error assigned as number 13. (Brief of Plaintiff in Error, p. 42.)

THIRD, (*Rec.* 177) to *all* that part of said charge in *italics*, as aforesaid, that relates to *the measure of damages* for non-delivery of November quota; *because* (and this was the *only* ground of exception announced to the court) "*the contract fixed the measure of damages, and the charge to the jury should have conformed to that rule*"—which exception is the basis of error assigned as number 14. (Brief of Plaintiff in Error, p. 42).

FOURTH, (*Rec.* 178) to *all* that part of said charge, in *italics* as aforesaid, that relates to plaintiffs' tow-boats, detention thereof and measure of damages therefor; *because* (and this was the *only* ground of exception) "such instructions improperly gave the jury to understand that Plaintiffs had made a proper claim for such specific liquidated damages; whereas the declaration contains no sufficient count to entitle plaintiffs to a recovery of such damages."

POINTS AND AUTHORITIES.

I.

The three great elements of interpretation of all contracts are: First, the language employed; Second, the subject matter of the contract; and Third, the intention of the parties. And the cardinal rules for interpretation of mutual covenants require: That, *one* part is not to be abrogated or impaired by another when *both* have an appropriate meaning fully satisfying the words; That, effect must, if possible be given to every word contained in the contract; That a construction which accords with reason is to be preferred to one which leads to an absurdity or impossibility; and that *above all*, it is the duty of courts to construe every agreement according to the *intention* of the parties.

We insist, that the intention of the parties in the case at bar, is apparent from an inspection of the instrument itself, (Ante, p. 2-4).

(1.) The word "month" means "*calendar*" month; and, by the terms of the "Ninth" Article of the contract it was the duty of said company to deliver to Phillips and St. John a particular quota of coal during each month, but, if the company failed to deliver the required quota in any month, then Phillips and St. John, *ipso facto*, became entitled to $50 a day, as liquidated damages, for each and every day either of their towboats had been detained in consequence of such failure on the part of the company to deliver said *required* quota, and, in addition to this liquidated damages on ac-

count of detention of towboats, Phillips and St. John also acquired *the right* to take 25 cents a ton for each ton of coal so undelivered, *or*, if they preferred, they might *elect to take the coal* so deficient, *in the next succeeding month* In the latter event, if the amount so carried forward from one month to the next succeeding month was not delivered in such succeeding month, then Plaintiffs were not compelled to accept the sum so named as liquidated damages, viz: the 25 cents a ton, but might sue for *actual* damages as soon as the company failed to deliver during a second month, any quota of coal carried over by election from a preceding month.

(2.) "Maturing obligations," as used in next to last covenant in "Ninth" Article of the contract, refers *only* to the "*paper*," specified in the "Fifth" Article, which was to be given at each monthly settlement and would be "*maturing*" during the existence of the contract.

(3.) By the terms of last covenant in said "Ninth" Article of the contract, neglect to perform engagements for "two consecutive months" did not *ipso facto* annul the contract, but merely gave to the party not in default the *right* to annul; and the contract, notwithstanding such neglect, would remain in force, *unless* and *until* said party not in default elected to exercise said right by *declaring* the contract at an end.

(4.) In support of the foregoing interpretation, the following authorities are cited, viz: Sedwick Meas. Damages, *2nd Ed. p* 399; Parsons Contracts, Vol. 2, *ch.* 1 *Secs.* 1, 2, *&* 3; 5. Wallace 689, *Nash vs. Toune;* 57. Penn (St.) 301, *Hazleton Coal Co. vs. Buck, etc.*

II.

Our first point, in respect to the true construction of the contract, being sustained, the court below committed no error in refusing to carry demurrer back to the declaration or in sustaining demurrer to 4th plea (Ante, p. 10).

(1) Each of said four counts contains all the *material* averments essential to *a good cause of action.* Being good in *substance*, as they certainly *are*, surplusage or inaccuracies of pleading can not be considered on *general* demurrer, or vitiate *after* verdict.

(2) The 4th plea is plainly bad; purporting to answer the whole declaration, it fails *in toto* to answer the 3rd additional count; it is also no answer to *any* of said counts, because the defaults therein alleged are *not* a failure to pay for "*coal received*" or "*rental*" or "*maturing obligations*," and because the plea fails to aver that the company ever *declared* the contract at an end.

(3) The demurrer to 2nd, 3rd, 4th and 5th pleas could not be carried back to *either* of said four counts if *any* one of them is good, because each of said pleas (Ante, p. 9, Rec. p. 33 to 40) purport to answer the *whole* declaration; nor could the demurrer to said three additional pleas (Ante, p. 9 and Rec, p. 60) be carried back to either of said two original counts, because neither of said three pleas purported to answer said original counts; nor could said last mentioned demurrer be carried back to either of said additional counts, if either one of them was good, because said three additional pleas each purport to answer *all* the additional counts.

(4) In support of the foregoing propositions, the following authorities are cited, viz: Chitty's Pleadings, Vol. 2, p. *270 & *271; 7. N. H. 361, *Stevens vs. Lyford;* 1. H & G. 444, *Williamson vs. Dillon;* 4. Gilm. 41, *Prather vs. Vineyard;* 12. Ills. 14, *Govenor vs. Ridgway;* 12. Ills. 218, *Stout vs. Whitney;* 14. Ills. 77; *Walton vs. Stephenson;* 14. Ills. 49, *Ryan vs. May.*

III.

Under the evidence and law applicable to this case, Plaintiffs' measure of damages could not have been *less* than that enunciated by the court:

(1) The contract in question is not a mere *bargain and sale* of coal, but a *special* contract of mutual covenants, whereby said company abandons its coal business *below* Cairo, leases its river stock and finds a market for its coal, through Phillips and St. John, who, in return are to give up their business *above* Cairo, keep said river stock in repair, and sell and dispose of the coal at or *below* Cairo, the inducement to the contract on the part of Phillips and St. John and in contemplation of the parties at the time, was the *profit* that would naturally and in due course of such business (well-known to said company,) accrue upon the re-sale of said coal at or below Cairo. Upon a breach of such *special* contract, Phillips and St. John are entitled to recover *all* their damages, including gains prevented as well as losses sustained—not *speculative* profits, but *profits* that are *reasonably certain*—profits which would have been *the immediate fruits* of the contract had it been kept by the company, viz: the difference between the market value of the coal at or below Cairo, and what it would have cost them *there* delivered.

1 Exch. 855. *Robinson vs. Harman;* 9. Exch. 341, *Hadley vs. Baxendale;* 20. Eng. L & Eq. 410, *Walter vs. Towers;* 26. Eng L & Eq. 398, *Hadley vs. Baxendale;* 7. Cush. 516, *Fox vs. Harding;* 7. Hill. (N. Y.) 61, *Marston vs. Mayor of Brooklyn;* 16. N. Y. 489-494, *Griffin vs. Colver;* 50. N. Y. 27, *Hineman vs. Heard;* 57. Penn. (State) 301, *Hazleton Coal Co.*, vs. *Buck. etc, Co.;* 13. Howard 330-334, *Philadelphia, W. & B. Ry.*, vs. *Howard;* Sedw'k, on Meas. Dam. 3rd Ed. *ch.* 111 *p.* 72 *to* 77 *and notes, also p.* 277, *2nd Ed.*

(2) Considered as a simple *bargain and sale*, the "General rule" as between vendee and vendor can not apply to the present case. It is a case of "*goods purchased for a particular market and that known to both parties*," and the damages must be measured by the market price at *that* market and *not* at the place of delivery. See authorities above cited, also: 1 Starkie 504, *Bridge vs. Wain;* 40. N. Y. 422, *Messmore vs. N. Y. Shot Co.;* 3. Peters (U. S.) 84, *Bell vs. Cunningham;* 10. Watts 418, *O'Connor vs. Forster;* 5. Hill 474, *Hargrous vs. Ablon;* Sedw'k on Meas. Dam. *2nd. Ed p.* 277.

(3) Conceeding the "*General Rule*" as between vendee and vendor as applicable, it is well settled law, that, in the absence of *clear* and *explicit* evidence of market value at place of delivery, evidence of market value at other places where there is a market and *especially* places where the article is usually sold, with cost of transportation thither, is admissible to establish, and, if there is *no market* at place of delivery, *does* establish the market value at place of delivery. 44 Maine 255, *Berry vs. Dwinell;* 1 H. & G. (Md.)

444, *Williamson vs. Dillon;* 30 Maine 491, *Furlong vs. Polleys;* 7 N. H. 361, *Stevens vs Lyford;* 12 Cal. 171, *Davoich vs. Stewart;* Sedw'k on Meas. Dam 3*d Ed. Ch X., p.* 274, *note* (1).

In the present case, upon the facts proven, (*clear, uncontradicted* and *undisputed*), as a matter of *law* there was *no market at Grand Tower*; and the legal effect of the evidence was to make the true measure of damages the difference between the contract price and the market price (the *only* price proven,) at or *below* Cairo, with cost of transportation, etc., deducted; and the court had the right to so assume the fact to be, *vide:* Ev. of Phillips and St. John (Ante, p. 17), Pratt (p. 19) and Driggs (p. 20); 7. N H. 361, *Stephens vs. Lyford;* 13. Wallace 57-63, *Bevans vs. U. S.*; 14. Wallace 442 *Improvement Co. vs. Munson.*

(4) Cost of transportation having been deducted and Plaintiffs charged therewith, while their own coal boats remained idle and at a large rental at Grand Tower, their indemnity would not be complete, unless as a part of their a*ctual loss*, they also recovered some further sum for detention of coal boats, in November while waiting for *October* quota and in December while waiting for *November* quota—which sum would be, especially in the absence of all proof except the contract itself, the amount agreed on in the contract as the fair measure of damages for similar detentions in respect to the *regular* quotas of coal, viz: $50 a day for each day's detention of each towboat. *Vide:* Authorities before cited and 9th article contract.

IV.

Reference being had to the foregoing points, and

authorities cited, none of the errors assigned in respect to evidence can be sustained;

(1) Number of barges under control of Plaintiffs (Ante, p. 14) with ability to have them at Grand Tower as soon as those already there could be loaded, certainly tended to prove the issue; and the conversation (p, 14) together with the "Four Letters" (p. 15), which went to the jury under proper instructions (p. 16), were rightly admitted in evidence as *admissions* of Defendant, from which the affirmative of the issue might be inferred; 18. Ills. 297, *C. B. & Q. B. Ry. Co. vs. Coleman;* 17. Ills. 588, *Huff vs. Roughson;* 20. Ills. 642, *Hungate vs. Rankin;* 49. Ills. 641, *Pahlman vs. Embry, etc*; 1. Scam. 196, *Arnold vs. Johnson;* 15. Ills. 224 *Ingalls vs. Bulkley* and 23. Howard (N. Y.) 64.

(2) Evidence of price of coal at Memphis and New Orleans, with cost of transportation (Ante, p. 22) was admissable in *any* view of the case, as shown under our third point, and the said facts—("First" p. 21) that *Plaintiffs at time of making contract in question, had been in business at New Orleans, under a contract with Defendant*—("Second" p. 22) that *Plaintiffs, "contract or no contract," could get no coal, even in the smallest quantity, at Grand Tower*—("Third" p. 22) that *the coal market on the Mississippi is effected by low water in the Ohio and that business men calculate accordingly as respects supplies, market prices, etc.*—were all admissible as evidence tending to show the general condition of the market, Plaintiffs' inability to get coal, and special matters within the knowledge and contemplation of both Plaintiffs and Defendant as coal merchants. 3. Hill (N. Y.) 338, *Smith vs. Griffith;* Sedw'k on Meas. Dam. *2nd Ed. p.* 275-276.

(3) Excepting prices of coal and cost of transpor-

tation, the admission of said evidence objected to worked no injury to Defendant; and, even if error, should not reverse this case, for, *without* it, the testimony, *not* objected to, proved the issue for Plaintiffs and justified the verdict. 10. Wallace 519, *Brobst vs. Brock*; 10. Wallace 263, *Deery vs. Cray*; 40. Ills. 316, *Rowley vs. Hughes*; 45. Ills. 228, *McKichan vs. McBean*; 42. Ills. 300, *Mattingly vs. Crowley*; 36. Ills. 161, *Nichol vs. Prettyman*; 51. Ills. 380, *Bauman vs. Bowles.*

V.

Reference being had to former points and authorities, none of the errors assigned in respect to instructions can be held sufficient to reverse this case:

(1) The whole of said charge *as asked*, as also each of its five propositions (p. 22 and 23) fails to present the law of this case; "1" even if proper, was fully covered by the charge *given*; "2" was bad by reason of the conjunction "*and*" as indicated in *italics*, p. 23 and because it actually forbade the jury from considering any evidence with respect to direct and *ordinary* damages—besides the jury had also been previously instructed sufficiently on the point, p. 16; "3" was *not* the law; "4" was an abstract proposition, misleading and inapplicable; "5" was ambiguous and unintelligible and incorrect in principle; and, even were the the charge *as asked* correct as matter of law, no reversal can be had on account thereof, because the charge as *given*, covered the entire case and submitted it properly to the jury. 18. Ills. 297, *C. B. & Q. B. Ry. Co. vs. Coleman*; 7. Wallace 565 *Laber vs. Cooper*; 10. Wallace 91, *The Schools vs. Risley*; 14. Wallace 442, *Improvement Co. vs. Munson.*

(2) The charge *given* (p. 24 and 25, *large type*) submits to the jury properly the *entire* controversy, viz: the *one* issue in the case and the true *measure of damages* It is sufficiently intelligible to be rightly interpreted by the jury in reference to the *contract* and evidence then before them. If it was ambiguous, Defendant should have asked the court to make it clear before the jury left the bar or it can not now complain, 1 Wallace 444, *Rogers vs. The Marshal;* 14 Wallace 442, *Improvement Co. vs. Munson;* 24 Ills. 445, *Howard, etc, Ins. Co., vs. Cormick;* 24 Ills. 480, *Springdale, etc., vs. Smith.*

(3) The *only* ground of exception, urged in the court below, to that portion of said charge, Error No. 13, which relates to measure of damages for non-delivery of *October* quota of coal (Ante, p. 26, "Second"), and to that portion of said charge, Error No. 14, which relates to the measure of damages for non-delivery of *November* quota of coal (Ante, p. 26, "Third") was, that "*the contract fixed the measure of damages and the charge ought to conform to that rule.*" Defendant can not *now* urge *other* grounds of objection in *this* court.

(4) The said assignment of Error No. 14 (Brief of Plaintiff in Error p. 42) is *broader* than the exception taken in the court below (Ante p. 26, "Third"). The exception went only to that part relating to *measure of damages*, while the errror assigned is to the *whole* of the charge relating to November quota; by reason whereof this assignment of Error No. 14, is bad and can not be considered by this court. 1 Wallace 644, *Rogers vs. The Marshal.*

(5) Error assigned No. 15 (Brief of Plaintiff in Error, p. 43) goes to the *entire* charge relating to dam-

ages for detention of towboats in October, November *and* December, the only ground of exception taken in court below (Ante, p. 26) being that *Plaintiffs had made no claim for such specific liquidated damages and had no sufficient count to entitle them to such damages.* Second original count (Rec. 28, Ante. p. 6) *does* expressly claim such specific liquidated damages for detention of towboats in *October* and *November*. Said exception was not, therefore, well taken nor is this error, No. 15, well assigned.

(6) Second additional and First original counts (Ante, p. 6 and 7) both claim *actual* damages for detention of towboats, in November for non-delivery *in* November of *October* quota; and Third additional count claims *actual* damages for detention of boats, etc., in *December* for non-delivery *in* December of *November* quota. As the proofs showed (Ante, p. 19) detention of towboats, etc., *in* December, and the only evidence of damage or loss on account thereof was the contract itself wherein the parties themselves had affixed a value to such loss in similar cases, to-wit: $50 a day for each day's detention of each towboat on account of non-delivery of a *regular* quota, said charge was certainly in accordance with the legal effect of the evidence, *in* including *December*. 13 Wallace 57-63, *Bevans vs. U. S.*

VI.

Whatever Error, if any, can be found in this case, the record, nevertheless, will show on its face that *substantial justice has only been done to the defendants in Error;* and, even this court, upon such evidence as appears in the record, could not find otherwise than as found by the jury below. The *one* issue in the case is proven for Plaintiffs beyond cavil or doubt; and the

breaches complained of were willful, premeditated violations of the contract as shown by the whole evidence warranting the jury (*Sedw'k on Meas. of Dam. 2nd Ed. p.* 276, 277, 278) in taking the highest market values proven. While the law contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time, (3 Hill 338, *Smith vs Griffith*), yet in the case at bar, an average of the *minimum* prices of coal even, with *highest* cost of transportation, and contract price, (less rebate of 25 cents a ton) deducted, would make the measure of Plaintiffs' damages, exclusive of towboat detentions, $208,090, and including detention of towboats $214,990 or $14,990 *more* than the verdict. 16 Wallace 577, *Walbrum vs. Babbitt;* 1 Gilm. 475, *Gillett vs. Sweat;* 2 Scam. 348, *Wheeler vs. Shields,* 3 Scam. 15, *Leigh vs. Hodges;* 21 Ills. 160 *Shultz vs. Lepage;* 19 Ills. 59, *Dishon vs. Schorr;* 23 Ills. 498, *Elam vs. Badger;* 33 Ills. 177, *McConnel vs. Kibble;* 35 Ills. 22, *Curtis vs. Sage;* 37 Ills. 338, *Coursen vs. Ely;* 38 Ills. 192, *Root vs. Curtis;* 41 Ills. 80, *Potter vs. Potter;* 41 Ills. 242, *Watson vs. Wolverton;* 45 Ills. 185, *Clark vs. Pageter;* 49 Ills 266, *Pahlman vs. King;* 49 Ills. 451, *Rankin vs. Taylor.*

HENRY S. GREENE,
(Of firm of Hay, Greene & Littler, Springfield, Ills.)

WM. B. GILBERT,
(Of firm of Green & Gilbert, Cairo, Ills.)

Counsel for Defendants in Error.

Supreme Court of the United States.

GRAND TOWER MINING, MANUFACTURING & TRANSPORTATION COMPANY,

PLAINTIFF IN ERROR.

vs.

WALTER M PHILLIPS & DAVID L. ST. JOHN, PARTNERS, &c.

DEFENDANTS IN ERROR.

ARGUMENT OF WM B. GILBERT, ON BEHALF OF DEFENDANTS IN ERROR.

MAY IT PLEASE THE COURT:

The main points of controversy in the case at bar are, "The true construction of the contract" and "The measure of damages." These settled—the errors assigned may all be classed under four general heads, viz: Errors in matter of Pleading; Errors in respect to Evidence; Errors in regard to instructions refused; and Errors pertaining to instructions given. These determined—a general inquiry into "The Real Merits of the Case," as presented by the record, may be of service. In the discussion of these several propositions, my references, unless otherwise indicated, will be to the pages of the foregoing "Brief of Defendants in Error;" in regard to which, and in justice to my learned associate, who will close the argument on behalf of our clients, I desire to say: that, whatever imperfections may be found in the Brief, they should not be placed to *his*

account; but my own; in as much as his other arduous professional duties and the distance that divides us, deprived me in a great measure, of his valuable assistance and suggestions in the preparation of the Brief.

I.

"The true construction of the contract" as contended for by Defendants in error is sufficiently indicated in their brief, p. 27. *This* was the construction placed upon it by the court below, and *this* construction is the *only* interpretation that fully satisfies *all* the words, does justice between the parties, and accords with reason and common sense. By reference to the contract it will be perceived (Rec. 12-22) that the company obligates itself to deliver, and Phillips and St. John obligate themselves to receive, a particular quota of coal, viz: 15,000 tons each month. *This* quota may very properly be called the regular quota—it *is* the quota of coal (I quote the language used in the "Ninth" Article,) to which the party of the second part are "*entitled*" each month; it *is* the quota which the party of the first part is "*bound to deliver under this contract;*" it *is* the *monthly quota of coal as herein provided;*" and it *is* "the quota which they (Phillips and St. John) are *bound, under this contract to receive.*"

The parties having, in and by the first seven articles of the contract, agreed upon the "*monthly*" quota which the one party was "*entitled*" to each month and "*bound to receive,*" and which the other party was "*bound to deliver*"—also concerning the price therefor and where the coal should be sold—also concerning the leasing of vessels and rental therefor, and the mode and manner of delivering and receiving these monthly quotas of coal—the "Eighth" Article, (Rec. 17) then, provides that, in

case of certain interruption mentioned, "the obligation of said party of the first part to deliver coal *under this agreement* (the monthly quota or *otherwise*) shall cease during such interruption" etc. The language is general —it extends to *any* coal deliverable under the contract and in this respect, is in marked contrast with the cautious and peculiar language used in the "Ninth" Article (Rec. 18). This latter article is the bone of contention in the present case. It says: if "the party of the first " part shall fail in any one month to deliver all or any part of the quota " of coal, to which the parties of the second part, may be *entitled* in such " month, the party of the first part shall pay to the parties of the second " part, as liquidated damages, twenty-five cents for each and every ton " which it may have so failed to deliver."

I ask, *what* "quota of coal" is here referred to? The language of the parties is, "the quota to which the parties of the second part may be *entitled*." Thus far in our reading of the contract, no mention has been made of *any* coal to which the parties of the second part are *entitled* except the monthly quota of 15,000 tons per month. This then, *must* be the quota of coal referred to—*this* then, must be the quota of coal, for the non-delivery of which, the parties of the second part acquired *the right* to take 25 cents a ton, as liquidated damages, for each ton so undelivered

It can *not* refer to aught else *but* the regular monthly quota of 15,000 tons per month; for as yet, in the reading of the contract, *no other* coal has been mentioned; and, although the contract may *afterwards* speak of some other coal, some indefinite and uncertain quantity (viz: "all or *any part* of 15,000 tons), yet it would be a perversion of language to call this uncertain and unascertained quantity a "*quota*." Happily, however,

I am relieved from further argument concerning the point in hand; for the learned junior counsel on behalf of Plaintiff in error, admits, on page 48, of his argument, that "the contract fixes and fastens the liquidated "damages upon the *regular* monthly quotas, and *not* "*the increased quota of any particular month.*" Defendants in error *insist* and Plaintiff in error *admits* then, that this 25 cents a ton *liquidated damages* has no application—no reference, to anything *but* the *regular* monthly quotas; and for non-delivery of these quotas *only* "the party of the first part shall pay to the parties "of the second part, as liquidated damages, twenty-five "cents for each and every ton which it may have so "failed to deliver; *or instead thereof*, (thus reads the "contract) the parties of second part may *elect to receive* "all or any part of *the coal* so in default, in the next succeeding month "in which case the quota which the party of the first part would other-"wise have been bound to deliver under this contract shall be increased "in such succeeding month to the extent of the quantity in default."

Counsel on page 48 of his argument aforesaid tells us that, the above language "does not warrant the construction contended for by the Defendants in error;" but fails to tells us very explicitly what the language *does* mean. He asserts that "The mere election of Phillips and St. John" to take the coal (*instead* of the liquidated damages) "would be no legal waiver" of the liquidated damages, if they failed to get the coal; and that they would have "a subsisting valid claim" for these liquidated damages, (which they had already *refused* to take) although the company during the next "suceeding month" was prevented from delivering the coal by reason of "the unavoidable causes mentioned in the *Eighth* section of the contract." I reply that the lan-

guage in the "*Eighth* section" (as before shown) can not be restricted to the *regular* monthly quotas, but is broad and comprehensive and includes *all* coal deliverable "*under this agreement.*" The company might wilfully refuse to deliver October quota of coal, and our clients might elect to take the coal in the next month. If in said "next month" the operations of the company were interrupted by "strikes of laborers" wholly incapacitating the company from mining *any* coal, then, in and by the said *Eighth* section the obligation of the company "*to deliver* (the) *coal*" would cease; and upon *this* theory is the declaration in this case framed. It expressly negatives the existence of such interruption. If then, by agreement of parties, the company is thus excused from delivering the coal; by what process of reasoning does counsel establish his "subsisting valid claim" against the company for liquidated damages? The company wilfully fails to deliver October quota—our clients, *refusing the liquidated damages*, elect to take the coal in November—in November the company again wilfully fails to deliver—counsel admits "the contract fixes and fastens the liquidated damages "upon the regular monthly quotas, and *not* the increased quota"—*ergo* (if our construction of the contract be not the true one), it must and does follow, as the night the day, either that this wilful failure of the company to deliver in November is "*damnum absque injuria*," or, that Phillips and St. John have "a subsisting" legal right to demand that, which they had *already refused to take*, and had surrendered to the company. Counsel is welcome to either horn of the dilemma. If he takes the *first*, he makes the contract "*unilateral*" indeed, and renders the said "*right of election*" a snare and a delusion—the barter-

ing away of twenty-five cents a ton liquidated damages for a "*damnum absque injuria*"—a bird in hand for *none* in the bush. Such a construction surely could not have been in the contemplation of the parties when they made this contract, and the court would hardly adopt such an absurd, harsh and unjust interpretation as this.

If the *second* horn of the dilemma is taken, then the supposed "right of election" becomes a *nonentity;* and the words, "or, *instead thereof,* may *elect,*" are not only impaired, but in effect, entirely abrogated. To "elect" means "to select, from among two or more, that which is *preferred*"—to choose between two alternatives—and *not* (as the learned counsel would have it) hold fast to *one* and say *please* give me the *other*—cling to your "subsisting valid claim for liquidated damages" until we (the company) *force* you to surrender it, by giving you *the coal* which you have already selected "*instead of*" the liquidated damages.

I respectfully submit, that the contract in question is an agreement between business men, and ought to be interpreted according to "principles of common sense and business." This "right of election" *means* something, and cannot be obliterated from the contract, and dismissed as mere matter of "moonshine"—it gives to Phillips and St. John a *choice* between two alternatives —money *or* coal; and when they choose *the coal*, their right to *the money* is forever gone. As a matter of common sense, *and* law, a right of election, *once* exercised, is at an end—dead and buried, and can not be resurrected. The learned counsel's attempted resuscitation theory can hardly be regarded as a "*sledge-hammer*" upon the gates of even his *own* understanding; for he feels it incumbent upon himself to look further in order to discover,

if possible, something else in the contract, that may, perchance, reconcile *the conscience*, to a total abrogation of that part of it which assumes to give "a right of election." He says in effect, (pages 48 and 49 of his said argument) that our clients' "claim to other than liquidated damages is *refuted* by the fact, that, in case Phillips and St. John "elect" to take the coal and the company then offers it to them, and they thereupon refuse to receive it, "all the damages that could be legally " claimed by the company would be just *nothing*," since the company on its part *agreed*, to only exact 25 cents a ton liquidated damages in respect to the *regular* quotas, and nothing in respect to the "increased" quotas. I here take issue with the learned gentleman, in regard to his premises and his conclusions—his interpretation of the contract and his law. Admit that this company, in order to to have control of the coal market *above* Cairo, lease its entire coal fleet *below* Cairo, and find sure purchasers for its coal, *did* so *agree*, as counsel has assumed —would *this* furnish a just nay, even a plausable ground for rejecting "what the parties inserted" themselves, viz: "or, instead thereof, the parties of the second part may elect to receive *the coal*."

If the company was, by the contract, permitted to say, with impunity to Phillips and St. John, "We have found a better market; we will pay you the liquidated damages and refuse to give you the coal," it might well be *presumed*, (as subsequent events have *demonstrated*), that Phillips and St. John, unable to procure sufficient coal elsewhere, would be forced to abandon the coal business, and maintain in idleness their enormous coal fleet, until this delusive phantom of "liquidated damages" became lost to sight in the *greater* sum exacted from

Phillips and St. John by the company, each month, as *rental* for boats, barges, etc. Hence it was eminently fair, reasonable and proper that there should be inserted in the agreement, the "right of election" whereby Phillips and St. John could say to the company, as Mr. St John did say to Mr. Olyphant (Rec, 97) in substance and effect: "Our business is stopped for want of coal; "we will not accept your liquidated damages; we "demand the coal, and if you fail to deliver it next month, "we shall hold your company responsible for the injury, "the *actual* damage, you thus inflict upon us."

On the other hand, if the company mined the coal and Philips and St. John refused to take it, the liquidated damages specified in the contract would, in all probability, cover the company's real loss—this sum would more than pay the expense of *mining* the coal, and the company would *still have the coal left.* Hence, it might well be said that Phillips and St. John *ought* to be "better secured" than the company. But, I forbear to press this point further; for, I do respectfully insist, that, according to the true interpretation of the contract, should Phillips and St. John "elect" to take the coal in the "succeeding" month, and then, upon tender thereof, refuse to receive it, "the damage that could be legally claimed by the company," instead of being "*nothing*," as assumed by the learned counsel, would be the real damage, if any, sustained by the company, viz: *actual* damages.

Of all the *many* covenants contained in the contract—*covenants to deliver and receive a regular monthly quota of coal*—covenants *not* to sell *above* Cairo, and an exclusive privilege of re-sale *below* Cairo—covenants to lease tow-boats, etc., and for ascertaining their valuation and rental therefor—covenants to keep tow-boats, etc.,

repaired and insured, and to return same at end of lease or pay for them—covenants to prepare statement of cost of mining, etc.—covenants of the company to pay liquidated damages, *or*, instead thereof, to deliver in the next month whatever amount of coal Phillips and St. John may "elect," not to exceed a given quantity—for breach of *none*, except those covenants relating to the delivery and receiving of a *regular* quota of coal, have the parties assumed to *liquidate* the damages—for breach of the *others* the parties respectively are entitled, "*ex-necessitate*," to such damages as the law itself provides.

Had Phillips and St. John, in violation of the contract, sold coal *above* Cairo; or had the company sold and delivered coal *below* Cairo; or had the company refused to let Phillips and St. John have its towboats; or had the latter refused to rent, repair, insure or return same at end of the lease—in either case, methinks, it would be absurd to say that the injured party had no remedy and could not recover actual damages for such breach—merely because the parties themselves had liquidated the damages in respect to some *other* breach of the contract. And, yet, the failure of the company to deliver *the coal* which Phillips and St. John might *elect* instead of liquidated damages, is a breach of the contract, as separate and distinct in itself as any of the breaches above mentioned—none of them can be, even remotely, effected by the fact that, the parties have liquidated the damages for breach by one party to *deliver* or by the other party to receive the *regular* monthly quota.

As respects the liquidated damages of 25 cents a ton to be paid *by* the company, counsel admits (page 48 of his argument), that "the contract fixes and fastens the

liquidated damages upon the *regular* monthly quotas" *only*. As respects the liquidated damages to be paid *by* Phillips and St. John, counsel also admits (p. 49 of his argument) that they refer only to "the *regular* monthly quota stipulated for in the contract." As respects the $50 a day to be paid by the company on account of detention of towboats, it is equally clear that it relates only to "*its* (the company's) *monthly quota*—its 15,000 tons per month, *each* month, its only "*quota*;" and *not* that uncertain quantity—one, 10 *or* 15,000 tons, that Phillips and St. John *may* "instead of" liquidated damages, "elect" to take, *out* of a "monthly quota." Thus, then, by the admissions of opposing counsel, by the very language of the parties, and by the true interpretation of the contract, the liquidated damages are confined *exclusively* to defaults in not delivering and receiving the *regular* "monthly quotas." It is as though the company had said to our clients, "We have agreed to deliver, and you "to receive 15,000 tons of coal each month, and this constitutes our "*monthly quota*—if, in any month, we fail to deliver to you this *monthly* "*quota*, we will pay you 25 cents a ton on every ton thereof we so fail to "deliver, *or*, at your option, give you *the coal* in the next month, along "with your "*monthly quota*" for that month. In addition to all this, we "will also pay you $50 a day for each day either of your towboats is "detained *in consequence* of our not giving you said *monthly quota*—On "your part, if, in any one month you take less than half of said "*monthly quota*, you shall pay *us* 25 cents a ton on each ton less than "half. As to all other violations of the contract, (and there may be "many others) we leave *them* for the law to settle—should you sell coal "*above* Cairo or we *below*—should you fail to insure, repair or return "leased property—should we fail to give you the coal we promised you "instead of liquidated damages—should you refuse to receive this last "mentioned coal after we tendered it to you—in all these cases, let the "law determine the measure of our damages—*we* do not liquidate them "ourselves."

The next position taken by the learned counsel (page 50 of his argument) is: Phillips and St. John

would "at the trifling expense of keeping one steam towboat and a few coal barges for ten months only in each of the three years moored," etc., realize under the contract from liquidated damages alone "the enormous sum of over one hundred and fifty-seven thousand dollars"—*therefore* "the payment of any damages other than the liquidated damages was not *intended*." If this is sound logic, my obtuse intellect fails to appreciate it; nor shall I mar the beauty and force of the syllogism by unnecessary comments thereon. I do desire, however, to call the attention of the court to the several letters of George Talbot Olyphant (Ante. p. 15 and 16), and, then, ask the learned counsel: "If Phillips and St. John dis-

" posed of their *enormous* river fleet; gave up their *expensive* coal
" yards at Memphis and New Orleans; discharged all their *numerous*
" employes; retained *no vessels* to transport this enormous quantity of
" coal—*no coal yards* wherein to store it—*no agents* to dispose of it—
" just *nothing*, except "*one steam towboat and a few coal barges;*" HOW
" MANY DAYS would elapse before this shrewd president, Mr. Olyphant,
" (deceased since the trial below, and I would prefer to "tread lightly
" o'er the ashes of the dead,") would "*place them in the wrong;*" and
" instead of suffering his company to go quietly, "like a lamb to the
" slaughter" of $157,000, would load the "few coal barges;" and *then*
" *debit* Phillips and St. John with the "sum of fifty-six thousand two
" hundred and fifty dollars with interest added "*and twice as much more for*
" *'rental,'*" "*repairs*" *and* "*insurance?*"—which last three items seem to
" have entirely escaped the mind of the learned counsel, while engrossed
" in the study of "Arithmetic."

Not only said *letters* but said company's *first plea* (Ante. p 9) refutes counsel's "*one steam-towboat*" theory —During nearly all of October, all of November, and all of December, our clients have under their control upwards of 50 barges, with capacity of 30,000 tons, and actually had moored at Grand Tower, ready for receiving coal *two* towboats and 16 or 17 barges with capacity of about

10,000 tons—the company *then* said, on the trial below, Phillips and St. John lacked the ability to receive even *one* "monthly quota" of coal—and yet, the learned counsel's proposition *now* is: "*One* steam-towboat and a *few* coal barges *for* 450,000 *tons of coal.*" Suppose the company had filled these "few coal barges" and our clients had no more, *who* would have demanded damages—our clients or the company? The contract *compelled* us to keep all the leased property ready to receive coal, even if the company's failures kept it all idle. Nothing in the "record" shows how much the "rental" was; but the magnitude of the contract and the number of barges shown are sufficient to satisfy the mind that this "rental" must have been *large*—the *fact* is, that the "rental," "repairs," "insurance" and care of the property amounted to *more*, per month, than the liquidated damages—"*a handsome fortune*," indeed! And if this be "*ordinary ambition*," as the learned counsel seems to think—*excess of expenditures over receipts*—our client's ambition does not, I am sure, run in that channel.

The learned counsel's next proposition—viz: The "liquidated damages" *ought to be conclusive* between the parties; *because* the concluding clause of the ninth section of the contract (Rec 20) gives to the party not in default *the right to annul* the contract if the other party fails to fulfill its engagements for two consecutive months—is peculiar and difficult to answer. I am wholly unable to perceive the remotest connection between the *right to annul* a contract, and the *measure of damages* for a breach thereof in case the party not in default deems it to his interest *not* to annul the contract.

If you bargained coal to a man at $2.75 a ton; and at the time you agreed to deliver it, coal could not be bought in the market for less than $10 a ton, and he actually needed the coal to enable him to carry on and keep up the business he had established; poor consolation indeed would it be to him to *cancel* the bargain and *release* you from your obligation to deliver the coal.

I agree with the learned counsel that the contract in question "shows unusual care in its preparation," and I therefore insist that he has no right to expunge from the contract the words "*or, instead thereof, the parties of the second part may elect to take the coal.*" I further concur in the law as held in the case cited by him (Hudson Canal Co., vs. Penn. Coal Co.) to the effect that, "In " interpreting contracts which seem not fully to express the obligations " on both sides, the question is what each party supposed the other " party understood by the contract;" for even if the present contract *could* be considered as fully expressing the obligations of the parties, the construction our clients contend for is the only one that accords with reason, justice and common sense; and it *is* the construction placed upon it by Mr. Olyphant himself (*Vide* his letter of September 10, 1870, Ante. p. 15); and if Mr. Olyphant considered, that the "*measure of damages would be * * the difference between the contract price * * and what they might have to* pay for other coal of equal quality," he certainly did not "*suppose*" that our clients "*understood*" the "*liquidated damages*" were to be "*conclusive* between the contracting parties." I further concur in the law as stated in the above case, to the effect that courts of law can not "*reject what the " parties inserted* unless it be *repugnant* to some " other part of the instrument;" and I respectfully insist that the words, giving our clients a *choice* between

money *or* coal, are not *repugnant* to *any* part of the contract; nor has the learned counsel yet pointed out any such repugnancy.

There are but two theories possible—two constructions *only* that *can* be placed upon this contract. *One* is, the construction adopted by Defendants in Error, sanctioned by his Honor, Judge Treat, of the District Court, approved by his Honor, Judge Davis, of the Supreme Court, and fully set forth in our brief (Ante. p. 27 and 28). This construction is *repugnant* to nothing in the contract, gives effect to *every* word in it, accords with *reason*, is *business-like*, and promotes justice.

The *other* construction is, that, when an "election" is made to take *the coal*, "instead of" the "liquidated damages, in the succeeding month," *the coal*, so carried forward into the "succeeding month," is merged in and becomes part and parcel of the *regular* quota and *the whole*, (viz: 30,000 tons), constitutes *the* monthly quota for said "succeeding month." If the company fail to deliver *this* quota, then Defendants in Error could take the liquidated damages of 25 cents a ton on the 30,000 tons, "or instead thereof" could "elect" to take all this coal in the *next* "succeeding month"; in which latter case the *next* quota would become 45,000 tons; and thus, upon each successive failure and election, the quotas would roll on from month to month, and from year to year, *ad infinitum*, to the end of the contract, extending through a period of three years.

This construction, in case of the wilful refusal of the company to keep the contract as indicated in Mr. Olyphant's said letters (Ante. p. 15), and which wilful refusal was not only *possible*, but is now a fixed *reality*, would either force Defendants in Error to take liqui-

dated damages, which they did not want, each month, or postpone all right of action to the end of the contract—*This* construction would make the *last* quota, in the *last* month of the *last* year 450,000 tons of coal; *more* coal than the company could possibly load in two years, its capacity being 1,200 to 1,400 tons per day (Ante p. 12), and *more* coal than could be received and transported by all the coal barges accessible on the Ohio and Mississippi rivers—*This* construction would eventually, after three years continuance of this farce of "election," give to Defendants in Error, *nothing but the liquidated damages* which they had for three long years been refusing; for, at the end of the *last* month of the *last* year, this quota of 450,000 tons being undelivered, *and the contract at an end*, there would be *no* quota of coal "in the next succeeding month" which the company would be "*otherwise bound to deliver ander this contract*," and the "right of election" having expired by its own limitation, would leave to Defendants in Error no alternative but to quietly pocket the liquidated damages *minus* the interest thereon which they *might* have realized but for this deceptive "*right of election*," inserted for their *benefit* as one would naturally suppose, but to their irreparable *injury*, if *this* construction be adopted—*This* construction, in effect, abrogates the "right of election," by rendering it "a dead-letter" in the contract, and of no benefit to Defendants in Error—*This* construction so impairs the contract, is so unbusiness-like and unjust, and leads to such absurdity that it is a libel upon the sublime name, 'Law." And *this* construction was so effectually disposed of by his Honor, Judge Davis, in his able opinion on the argument below, that the learned counsel seems to have abandoned the same, and now insists (page 48 of his argument) that "the contract fixes and fastens the liquidated

damages upon the *regular* monthly quotas, and *not* the increased quota of any particular month;" which admission is inconsistent with the construction now under consideration; for, if the coal "elected" to be carried forward does *not* merge in and become part and parcel of the *regular* quota, but is something different, distinct and separate in itself and to which the liquidated damages does *not* attach—a particular, separate and distinct quantity of coal, more or less as Defendants may elect, which (as we claim and as counsel seems to admit) is to be delivered *in addition* to the *regular* quota to which liquidated damages *do* attach—then, this theory as to the "rolling up" of quotas can not be sustained. Sedgwick says: "The courts, especially in this country, have "generally shown a marked desire to lean towards that "construction which excludes the idea of liquidated dam-"ages;" and we think the rules of construction, familiar as "household words," together with the other authorities cited (Ante. p. 28), warrant the construction contended for by Defendants in Error, as the "*true construction of the contract.*"

II.

"The true measure of damages" in this case admits of more discussion; and, yet, in no view of the case, as shown in Brief of Defendants in Error, (Ante. p. 30 to 32,) and authorities there cited, has Plaintiff any right to complain of the measure of damages as enunciated by the court below.

(1) Concede, for the purpose of the argument, that the contract in question was nothing else than a mere, simple bargain and sale of so much coal and the measure of damages was the difference between the contract price and the market value of the coal at Grand

Tower. Phillips testifies, (Ante. p. 17,) "no mines at Grand Tower but Defendant's mines; Defendant makes the *only market* there is there for coal." Driggs, superintendent of the company, testifies, (Ante. p. 19 and 20,) that, "*no coal was sold at Grand Tower other than the coal sold by the company;* that he did sell coal there *for the company* during the months in question, but it was nearly all sold under contracts made in January: what little he sold outside of these contracts he got $4 a ton for, but "*could have got more than $4, if he had put up the price.*" Mr. Olyphant, himself, president of this company, writes to Driggs, (Ante p. 15,) September 1, 1870, "We must put up the price of coal * * to $4.50." This evidence is in no wise impeached, contradicted or weakened by anything in the record contained. It establishes, beyond question, the fact there was no "general market" for coal at Grand Tower. As a proposition of law and common justice, one man owning all the coal there is at a place, selling all the coal there is sold there, asking his own prices, raising the prices when his interest demands it and lowering them when he thinks it "policy" to do so, can not and does not, within the contemplation and true meaning of the law, *make* "*a market*" such as the law requires, as a standard for the measure of damages, when the rights and interests of *that* man are involved in the controversy; otherwise *that* man could violate his contracts with impunity, and, by lowering prices to suit his convenience, evade just punishment for the injury he inflicts. Now, I ask, what *was* the true market value of this coal at Grand Tower? Was it $3.50 per ton, as exacted by the company from Memphis Packet company and St. Louis furnaces? Or, was it

the $4 per ton demanded by the company from "outside boats?" Or, was it the $4.50 per ton which Olyphant instructed Driggs to ask of transient customers?—Most assuredly neither; not the first, because *that* was the *contract* price in the preceding January (Ante. p. 20)—not the second, because the company could have gotten "*more*" had it asked it (Ante. p. 20)—not the third, because Olyphant might just as well have said $1 or $10, as $4.50, had he deemed it "policy" to have done so. There can be but one answer to the question; there was *no* "general market" for coal at Grand Tower, and coal sold there at just such prices as the Plaintiff in Error choose to ask for it. The company monopolized the business and made a market to suit itself—the *only* market there. To take such prices, as a rule of damages, is, to compel our clients to take, and permit this company to pay, what never, in truth, *was* the value of this coal, then selling at Memphis and New Orleans at $10 to $15 a ton over and above cost of transportation Compelled by "*contract*" and moved by "policy," this company may have rated and did rate this coal, at the time in question, much below its true value. How unjust then to bind our clients by *such* prices. Sedgwick (Meas. dam. 2nd Ed. p, 278) says: "To make a market there must be buying and selling, purchase and sale"—in the present case, nobody *had* coal, nobody *sold* coal, but the company—there were no purchasers except two foreign corporations under *old contracts*, and a few passing steamboats *at the company's own prices*,—this certainly did not "*make a market.*"

In Stevens vs Lyford, 7, N. H. 361, which was an action by a vendee against a vendor for non-delivery of

lumber at Franklin, by reason whereof plaintiff "*had lost and been deprived of diverse gains and profits*" etc.. as avered in the declaration, the court say: "The "general principle respecting damages may be as contended by "Defendant, *but the case does not find there was any market price* at "Franklin. *There was no lumber sold there except what Defendant sold to "make a market. The only way to assess damages was to resort to the evi-"dence offered* (viz: evidence of market value at Boston, Charleston and "Medford, and expense of rafting the lumber from Franklin to those "places, where the lumber was usually sent for sale); *and in that way to "ascertain the value at Franklin.* The profits (averred in the declaration) "means only the profits which would have accrued by the general course "of trade."

In Williamson vs. Dillon, 1 H. and G. (Md) 444, which was an action by a vendee against a vendor to recover for loss sustained because flour, sold and delivered at *Zanesville*, was of inferior quality; it was in proof, that Defendant owned the mill at Zanesville that manufactured this flour, that New Orleans was the great mart for flour on the Mississippi river, and that the flour trade at Zanesville was in its infancy; the court held: that the measure of damages as to value was the same as in case of non-delivery, viz: value at time and place of delivery; that, "in the absence of *direct positive proof* of value at place of delivery the jury may take value at other places in the neighborhood and *particularly* at a place where such articles are *sent*, from the place specified, *for sale*;" that, in the absence of *positive* proof of value at Zanesville, proof of price at other places in the neighborhood of Zanesville and at New Orleans, a port where flour was commonly sent from Zanesville for sale, is admissible.

In case of Berry vs. Dwinell, 44, Maine, 255, an action by vendee vs. vendor, the court say: "The "market value at the time and place of delivery was the fact to "be ascertained. But, if at such time and place they had no market "value, *is the party violating his contract to be exonerated from all lia-"bility*? Market value is only ascertained by sales made. If none on

" the precise day, recourse can be had to sales nearest the time. The " same principle applies *in space*; if there is no market at place of de- " livery, the value at the nearest points which afford a market and *at* " *which sales were usually made should be ascertained in reference to the* " *damages.*"

In case of Furlong vs. Polleys, 30 Maine, 491, hay was sold to be delivered at a specified place in the forest, where there was no market for its sale: the court held: "that plaintiff's *measure of damages* was " the difference between the contract price and the market price at the " nearest and *most suitable place* where it could be purchased, together " with necessary cost of transportation therefrom."

In Davoich vs. Emerick, 12 California, 171, which was a suit of vendee vs. vendor to recover damages for non-delivery of fruit at an orchard some distance from San Francisco; the court said: "If there was no ascer- " tained fixed value at the orchard, the market value at San Francisco, " less cost of gathering and carriage would furnish the rule of value."

In the case of Hazleton Coal Co. vs. Buck, etc., Co. 57 Penn. (State) 301; plaintiffs owned a coal mine some distance from Penn Haven and made a special contract with defendants to secure transportation of plaintiffs' coal from its mines to *Penn Haven*, from whence it was generally shipped by plaintiffs to other markets for sale; the construction of the contract and the measure of plaintiffs' damages, occasioned by defendants' failure to transport the coal, were the points in controversy; on the first point, the court said: "It is a cardinal rule " of interpretation of mutual contracts that you are not " to abrogate or impair one part of a contract by another " when that other has an appropriate meaning which " fully satisfies the words." Which language applies with force to *our* first point already discussed. On the second point the court then said: "If the jury " find defendants failed to transport the coal offered to

"them under the contract, the damages would be the loss plaintiffs suf-
"fered on the coal thus ready and offered for transportation, which
"loss would be the difference between the cost of mining, preparing and
"transporting the coal to Penn Haven, and the price it would have
"brought there. This is the direct and immediate consequence of the
"defendant's breach of their contract. *Defendants had the exclusive con-*
"*trol of the transportation. Plaintiffs had no other route to Penn Haven*
"*to avail themselves of and to reduce the loss to the difference in cost of*
"*transportation. Plaintiffs being confined to this route, and yet denied it*
"*by defendants, the direct loss is the difference between the cost of the coal*
"*at Penn Haven and the price it would bring there*, or in other words
"the *profits*. I say Penn Haven because it is the terminus of the Hazle-
"ton road and of the shipment under the contract; but the actual ship-
"ment did not end there, the coal being carried to markets further off,
"and *there was probably no general market for sale of coal at Penn*
"*Haven*. The jury would therefore *have a right to take the price in the*
"*market of sale*, and to deduct from this the cost of transportation
"from Penn Haven and expense of putting the coal in the market *in*
"*order to find a fair price at Penn Haven*, and from this deduct the cost
"of mining and preparing and transporting it to Penn Haven."

In Sedgwick, on measure of damages, 3d Ed., Ch. X, 274, note (1), in discussing the general rule of damages between vendee and vendor, it is said: "A complete "indemnity requires that he should receive that sum which, with the "price he had agreed to pay, would enable him to buy the article which "the vendor had failed to deliver. The value in the market on the day "forms the *readiest and most direct method* of ascertaining the measure "of this indemnity in both cases, and *accordingly*, where a market "value *exists*, the law has *adopted* that standard."

But, suppose there is no market *at the place of delivery*, and there *is* one some where else—suppose the market at place of delivery is palpably an unfair market, an unjust market, a market made and controled by the defendant himself—can the above reasoning apply?—Will the law, founded in justice, "adopt that standard?" Most certainly not. Sedgwick himself (same note) further says: "In an action for the non-

"delivery of goods agreed to be sold, if there is no evidence of their "value at the place of delivery, evidence is admissible of their value at "other places in the neighborhood of the place of delivery, *and also at "distant places*, where there is a market for the same articles, *in connec-"tion with proof the expense of transportation* between such places and "the place of delivery. *It is only where the evidence is clear and explicit "as to the value of the article at the place of delivery*, that evidence of "value at other places is inadmissible."

I respectfully submit that there is no need of further multiplying authorities. Even in cases of *ordinary* bargain and sale, it is good common sense, supreme justice and *the law*, that "it is only where the evidence is *clear* and *explicit* as to the value of the article at the place of delivery, that evidence of value at other places is inadmissible;" and that, in the absence of such clear and explicit proof, evidence at even "*distant places where there is a market*," and "*particularly at a place where such articles are sent from the place specified for sale*," together with evidence of cost of transportation thither, is not only admissible in evidence but eminently proper; and that, when "*the case does not find there was any market price at* the place of delivery—*none sold there, except what defendant sold to make a market*"—the "*only way to assess damages*" is "*to resort to the evidence offered*" as to value at other places, as above specified, "*and in that way to ascertain the value at*" the place of delivery.

In Bevans vs. U. S., 13 Wallace, 57; it is decided that an instruction "in accordance with the legal effect of the evidence" is admissible and proper; and, that, where there are no disputed facts, "the court may properly tell the jury, in an absolute form, how they shall find."

Now, apply this law to the case at bar, considered

as a mere bargain and sale of coal to be delivered at Grand Tower, for no particular purpose and under no special contract, and how does the case stand?—Plaintiffs proved (Ante. 17-21) that Defendant owned the *only* mines at or near Grand Tower; that Defendant makes the *only market* there is there for coal; that *no coal was sold there other than the coal sold by Defendant;* that Defendant even sold none there except under existing contracts of long standing, and some little to transient steamboats *at Defendant's own prices;* that plaintiffs, at the time of contracting for the coal, had their headquarters for receiving and disposing of it at Memphis, and a depot at New Orleans where they had been in business under a contract with Defendant; and that the coal in question, together with Pittsburg and Ohio River coal, were the kinds of coal that supplied the Memphis and New Orleans markets, the coal in question rating $1 a ton less than Pittsburg coal in those markets. Plaintiffs then proved the market value of the coal at Memphis and New Orleans, together with cost and expense of transportation thither; and *this*, in substance, was all the evidence there was in the case. There was no proof of a general market at Cairo even, or of the value of the coal at that point. There was, as matter of law, upon the undisputed facts proven, no general market at Grand Tower. There was proof of a general market and market prices below Cairo on the Mississippi river, viz: at Memphis and New Orleans, where this coal was usually sold; and proof of what it cost to put the coal in those markets; and these prices with cost of transportation deducted, and due allowance made for hazard of transportation, established the market value *at* Grand Tower with almost *mathematical*,

and *more* than ordinary *legal* certainty; and were the *only* prices—the *only* evidence upon which the jury *could* base a verdict. The measure of damages as given to the jury by the court was, then, certainly according to "*the legal effect of the evidence*," even if we concede to the learned counsel the point he contends for, viz: that the "general rule" for the measure of damages as between vendor and vendee should be applied to this case.

(2.) Defendants in Error, however, insist that this "general rule" has no application to the present case—that it is a case of "*goods purchased for a particular market, and that known to both parties*," and the damages must be measured by the market price at *that* market.

In Bridge vs. Wayne, 1 Starkie, 504, where goods were purchased in England *for re-sale in China*, the jury were allowed to base their verdict on the market value of the goods *in China;* and, having found accordingly, Lord Ellenborough refused to disturb the verdict, saying:

"I am decidedly of the opinion that by value (in ascertaining damages) is to be understood the value plaintiff would have received had defendant performed his contract. Plaintiff is entitled to all the losses which he has sustained in consequence of not having in China those goods defendant had undertaken to supply."

In Messmore vs. N. Y. Shot, etc., Co., 40 New York, 422; where bullets were purchased at New York for transportation to Columbus and re-sale there to the government, and this was known to the defendant, Mason, J., says:

"The general rule of damages ordinarily is the difference between the contract price and the market value at the time and place of delivery fixed by the contract. This is not the *invariable* rule in *all* cases. The

general rule is that the party injured by a breach of contract is entitled to recover *all his damages*, including *gains prevented as well as losses sustained, provided they are certain and such as might naturally be expected to follow the breach.* In commodities commonly purchasable in the market it is safe to say (the general rule) *because* he can supply himself by going into the market and making his purchase at such price, and these are ordinarily all the damages he is entitled to, for nothing more is contemplated. *The rule however is changed when the vendor knows the purchaser has an existing contract for re-sale* at an advance price and the purchase is made to fulfil such contract, * * because these *profits*, which would accrue to the purchaser upon fulfilling the contract of re-sale, may be justly said to have *entered into the contemplation of the parties in making the contract.* This rule is based upon reason and good sense and is in strict accordance with justice."

Daniel, J., in delivering his opinion in this same case, says:

"*As these bullets were not designed for the New York market, but for transportation to and sale at Columbus, their value at that place constituted a proper subject for consideration upon the question of damages.* If Plaintiff had not been entitled to less profit (on the re-sale to the government) *the difference between the contract price and the market value at Columbus would have formed the measure of damages.*"

In Bell vs. Cunningham, 3 Peters (U. S. Sup. Ct.) 84. upon a contract to purchase tiles in Leghorn for ***re-sale in the Havana market***, that profound jurist, Chief Justice Marshall, in delivering the opinion of the court, said:

"We do not mean that speculative damages dependent on possible schemes ought ever to be given, but positive and direct loss resulting plainly and immediately from the breach, may be taken into the estimate. Thus an estimate of possible profits to be derived from investments at Havana of *the money* arising from the sale of the tiles, taking into view a distinct operation, would transcend the proper limits; but *the actual value of the tiles themselves at Havana affords a reasonable standard for the estimate of damages.* The instructions of the Judge seem to contemplate this course;" and the judgment is affirmed with interest.

In Hargous vs. Ablon, 5 Hill, 474, the same general doctrine is laid down, viz: that where goods are

purchased for a particular market and that known to both parties, the damages have been governed by the price at that market; Bridge vs. Waine is cited with approbation; and the court say:

"The promise concerning a thing, being general, viz: not having reference to any purpose for which it to be used out of the ordinary course, the law does not go beyond the general market in search for an indemnity. The exceptions will all be found to be in the special nature of the promise."

In O'Conner vs. Forster, 10 Watts, 418, where wheat was sent from Pittsburg to Philadelphia, for resale in the latter market, it was held that the damages were properly measured by the market value at Philadelphia, with freight added.

In Sedwick on measure of damages, page 277 of 2d Ed., after discussing the "general rule" and reasons therefore, says:

"If it be shown that the article was to be delivered for some specific object, known to both parties at the time, and that thus a loss *within the contemplation of both parties* has been sustained, *it may form an exception to the above rule.*

In Beary vs. Dwinell, 44 Maine, 255, before referred to, the court, in referring to the same rule, further say:

"The rule is only a 'general' one and by no means an *absolute* or *invariable* one. The party is to be indemnified—this is the *great* rule of damages in *all* such cases, viz: the innocent party should be *made whole* or be completely indemnified for the loss which the non-performance has occasioned. The rule for the price of goods * as the criteron of damages, being thus but a general one is liable still to be effected by every legitimate consequence." "The damages" (in this case, viz: those based upon market price *at place of re-sale*, and *not* at place of delivery,) "are such as both parties, in making the contract, may *reasonably* be supposed to have contemplated as the *probable* result of a breach."

In Fox vs. Harding, 7 Cushing, 516, the law is thus stated by the court:

"In an action for breach of a special contract, plaintiff may re-

cover, as part of his damages, such *profits as would have accrued to him from the contract itself, if it had been performed*, but not profits he might realize from *other contracts* made on the faith of it."

In Griffin vs. Clover, 16 N. Y., 493, the whole question underwent discussion and was fully considered; the court said:

"It is only uncertain and contingent profits which the law excludes and *not* such as, being the immediate and neccessary result of the breach, may be fairly supposed to have entered into the contemplation of the parties when they made the contract and are *capable of being definitely ascertained in reference to established market rates.*"

In Hineman vs. Heard, 50 N. Y., 27, this same doctrine is clearly announced by the court, and it is held that:

"Upon a violation of a contract entered into for the express purpose of procuring *goods for sale at their places of destination, a loss of profits, the direct consequence of the breach, if within the contemplation of the parties at the time of making the contract, and if not speculative or contingent, may be recovered.* The fact that damages have been sustained must be proved with *reasonable* certainty; but *even a loss of profits, if within the contemplation of the parties at the time of entering into the contract and a direct consequence of the breach and not speculative or contingent, may be recoverable.*"

In Ills. C. R. R. Co., vs. Demans, 44 Ills., 292, "profits" were allowed; also in Straum vs. Cog, 28 Ills., 457; in White vs. Mosely, 8 Pick., 359; in Clifford vs. Richardson, 18 Vermont, 620; in Ingram vs. Samson, 6 Bing. (N. C.) 212; in 13 Alabama, 509; in 18 Pick., 78; in 9 Wend., 325; 17 Wend., 71; in 23 Wend., 425; and in case of Downell vs. Jones, 17 Alabama, 692, where the authorities are reviewed and it is shown that this denial of "*profits*," as any part of the damages to be compensated, is carrying the doctrine too far; and that "*profits*" *are* recoverable when *reasonably* certain and within the *reasonable* contemplation of the parties.

Such too is the doctrine held in the recent English

decisions; Robinson vs. Harman, 1 Exchr., 855; Hadley vs. Baxendale, 9. Exchr. 341; Walter vs, Towers, 20 Eng. L & Eq., 410 and Hadley vs. Baxendale, 26 Eng. L & Eq., 398; where the law is laid down as follows, viz:

"If *reasonable* evidence is given that the amount of *profits* would have been made as claimed, the damages *may be assessed accordingly.* * The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, *so far as money can do it, to be placed in the same situation,* with respect to damages, *as if the contract had been performed.* * Where two make a contract and one of them has broken it, the damages should be either such as may fairly and substantially be considered as arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, *or such as may reasonably be supposed to have been in the contemplation of both parties at the time* they made the contract as the *probable* result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by plaintiff to defendant and thus known to both parties, the damages resulting from the breach of such contract, which they would *reasonably* contemplate, would be the amount of the injury which would ordinarily follow from a breach of the contract under these special circumstances so known and communicated. The above principles are those by which we think the jury ought to be governed in estimating the damages arising out *any* breach of contract."

The subject of "profits" was fully considered by the supreme court of New York, in the case of Marsterton vs. The Mayor of Brooklyn, 7 Hill, 62, and the true line between those profits which are to be allowed, and those which are to be rejected, ably drawn. Chief Justice Nelson, in delivering the opinion of the court, says:

"When the books and cases speak of the profits anticipated from a good bargain, as matter too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith of the principal contract. But *profits* or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are *part and parcel of the contract itself—entering into and constituting a portion of its very elements*

—something stipulated for, the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement."

This same distinction is sustained in 13 Howard. 340, Philadelphia W. & B. R'y vs. Howard, and in 7 Cushing 516, Fox vs. Harding; and these cases are cited, with approbation, by Mr. Sedgwick, in his excellent treatise on measure of damages, 3d Ed. ch. III, pages 72 to 77, where he says:

Indeed, on reviewing the whole subject it seemed to me * that it is no more than just that a defendant in default should be compelled to make good the damages sustained by his breach of contract which were contemplated or may *reasonably be supposed to have entered into the contemplation of the parties at the time of the contract.*"

Not only have we the authoritative sanction of this honorable court in favor of the proposition contended for, in the opinion of Chief Justice Marshall (3 Peters 84, ante.), but also in 13 Howard (above cited) 344, where your honors say:

" *It by no means follows that profits are not to be allowed, understanding as we must the term profits as meaning the gain which the Plaintiff would have made if he had been permitted to complete his contract.* Actual damages *clearly* include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.*'

As respects the case at bar, I respectfully submit, that, upon the law aforesaid, American and English, and upon the evidence before the jury, the rule of damages adopted by the court below was *no more* than giving to plaintiffs an *indemnity* for the injury sustained by them, and *reasonably* within the contemplation of the parties, at the time they made the contract in question.

Article " second " of the contract, (ante p. 2) in substance, and in fact, prohibits defendants in error

from selling this coal *above* Cairo and gives them the exclusive right to sell and dispose of it at or below Cairo. The "third" article (p. 2) leases to defendants all the company's tow-boats, barges, tugs, flats, tools, ropes, chains, etc., *at Memphis.* St. John testifies (ante p. 17) that, at the time of making the contract, the headquarters of defendants in error for receiving coal was at *Memphis*, and they also had a coal depot at *New Orleans*, where, says Mr. Phillips (ante p. 18), they had been in business under a contract with the company. Speed testifies (ante. p. 19) that the Grand Tower coal for past 2 years had been one of the kinds of coal that supplied the Memphis market. No impartial mind can read *this* contract and *this* evidence without reaching the irresistible conclusion, that this coal "*was purchased for a particular market*" *by common consent and knowledge of both parties;* that it was not only to be re-sold at or below Cairo, but *nowhere else;* that the exclusive *right* to sell this coal at or below Cairo and not elsewhere was the very thing "*stipulated for*" in the contract; that the *profits* which it was expected would accrue upon such re-sale of the coal at or below Cairo formed "*the only inducement to the arrangement*" whereby defendants bound themselves to receive the enormous quantity of 15,000 tons of coal a month, rent the company's large river fleet at Memphis, and sell *none* of this coal *above* Cairo; that *these profits*, viz: the difference between what the coal would cost them *delivered* at or below Cairo and what they could there sell it for, in due course of business, to-wit: the market price at or below Cairo, were the expected "*fruits of the contract*"—"*part and parcel of the contract itself*"—*entering into and constituting a portion of its very elements*"

—"*something stipulated for, the enjoyment of which is just as clear and plain as the fulfillment of any other stipulation;*" and that Mr. Olyphant, the president of this company, at the time he signed this contract could *reasonably contemplate*, suppose and *know* that if he failed at any time to deliver this coal the real loss of Phillips and St. John would be *these profits* —not *speculative profits*, as the learned counsel would have it, and which the law excludes, not profits to arise from some "*special contract*" that Phillips and St. John might make with third parties on the faith of their contract, as the learned counsel would also have it, *and which the law also excludes*, unless specially within the contemplation of the parties—no, not *either* of these; but profits *to arise in the regular course of business* —*profits* that can be calculated with *reasonable*, if not with almost *mathematical certainty*, viz: the difference between the *market value* of the coal at or below Cairo, and what it would have cost Phillips and St. John *there delivered*. *These* damages (call them profits or what you please) were certainly within the *contemplation of the parties* when they made the contract, and they are no more "*speculative*" than are damages based on market value *at place of delivery*; they can be calculated with the same *reasonable mathematical* precision; and Sedgwick on measure of damages tells us, and common sense tells us that they are *both*, in a certain sense, *profits—one* as much as the *other*.

It is easy for the learned counsel to *call* these "*speculative*" profits," and cite authorities innumerable against the allowanance of "speculative profits;" but he wholly fails, as it seems to me, to com-

prehend the real character of these alleged profits, or to draw the proper distinction between profits that *are* speculative and profits that are legitimate; losses that are *not within the contemplation of the parties* and losses which are; otherwise he would readily perceive the unsoundness of his argument and the inapplicability of his authorities to the case at bar.

The purport of his argument, pages 53 and 54, is that the market prices at Memphis and New Orleans should not be adopted; *because* it is not *avered* or *proven* that Phillips and St. John had made some *special* contract for re-sale of the coal; and *because* it is not proven that the company (in violation of *its* contract) sold coal south of Cairo; and *because* the market prices, owing to scarcity of coal occasioned by low water were (legitimately) higher in the fall of 1870 than in 1869; and *because* to take these prices would make the actual loss *twice* the amount of the contract price; and *because*, finally, it is not shown that our clients ever sold, contracted to sell, or paid one cent for this coal.

I insist that these matters do not effect the question in hand. Counsel might, with equal propriety, apply the same argument in nearly every case of vendee vs. vendor as reasons why the market value at place of *delivery* should not measure the damages. How many vendees "sell, contract to sell, or pay one cent for" goods *not* delivered? What rule of law restricts the vendee's damages to *less* than *twice* the contract price? What legal principles *forbids* measuring damages by the market price *because* higher than *usual*? What es-

tablished principle bids the vendee prove a *special* contract of *re-sale* before he can demand damages? The vendor takes his chances on a rise or fall in the market, as also every legitimate consequence that may raise or depress the market. He can not say to the vendee, "You shall not measure your damages by the *market price*, because it is higher than usual—higher than I thought it would be when I contracted to sell." Had the company agreed to deliver this coal *at* Memphis and New Orleans, counsel would hardly contend that the *market values* there as proven should be excluded because those prices were "greatly in excess of the usual prices," caused by "scarcity of coal," owing to the fact that "there was no means of getting coal from up the Ohio which was low, and the supply ran out." I see no difference between the case just put and the case at bar; *both* are the same in principle; *both* measure the damages by the *market value; one*, because *there* is the place of delivery and therefore the place in contemplation of the parties; the *other*. because *there* was the place agreed on by the parties for re-sale of the coal and therefore the place within the reasonable contemplation of the parties. Whether low water in the Ohio was or was not reasonably contemplated by the company, is immaterial in either case. If material, the evidence does show the affirmative; the company is a mammoth coal merchant, and owned vast coal mines near the mouth of the Ohio, and coal fleets, etc., at Memphis (ante. p. 2) to dispose of its coal; its coal was the only coal besides Ohio river coal (p. 19) that supplied markets below Cairo; the Ohio river is low every fall, so regularly that business men make calculations (p. 19 and 20) with reference to these low stages during which

no coal can be transported. This company, as business men, with mines at the mouth of the river, and deeply interested in the coal market, must have had reasonable cause to contemplate and know that if it failed to deliver coal and the Ohio should continue low, as it was liable to do, then, by the inevitable law of supply and demand prices would advance. It requires but an inspection of the record to satisfy a reasonable mind that Olyphant knew, when he signed the contract—knew, when he determined Sept. 30, 1870, (ante. p. 15) "contract or no contract they will get no more coal from us," that his action would have the very effect on the market it did have, and that Phillips and St. John's actual loss would be just the difference between what the coal cost them delivered south of Cairo and what coal was selling for in those markets, viz: the market price—be it high or low, much or little.

I further submit that whether the vendees could have re-sold all the coal at the market rates, had it been delivered, is not a proper subject of inquiry. In Dana vs. Fielder, 12 N. Y., 40, the court say:

"The evidence should be confined to the actual market value and Defendant is not allowed to inquire as to the probable effect of adding to the quantity in market that which he agreed to deliver:" nor is it "proper for defendant to inquire as to its value in quantities equal to that named in the contract unless it it first shown that there was a market price for it in such quantities;" "nor can he inquire the *usual difference* in quantities large as that to be delivered, when it does not appear that it could be purchased then and there in the quantity specified in the contract. If no sales that day, reference may be had * to sales made within a reasonable time before and after."

Mr. Sedgwick affirms the same doctrine. Such enquiries would more frequently do injustice than justice, and open up a wide and uncertain field of investigation.

The better rule is that the law presumes always that the vendee or vendor will buy and sell at the current market rates.

In the case at bar, however, the evidence sufficiently shows that had the vendees received the coal from the company (the Ohio river being closed) they would have had control of the market and realized the market rates on every pound of the coal. The proofs show (ante. p. 21): no coal arrived at New Orleans in October, November or December; in usual times about 9,000 bushels arrive daily, that much less in the market in October than in preceeding month; twice that much less in November than in October; three times that much less in December than in November; had 15,000 tons arrived in October or November it could easily have been sold at the then current rates; 30,000 tons only in one month would have reduced the price; no difference in price between large and small quantities; 15,000 tons could not have been purchased in New Orleans—that much there, but in hands of retail dealers. Not only then does the law presume it, but the proofs show it that the venders could have sold 150,000 tons in November, and 15,000 in December at the then current rates, and thus actually disposed of all the coal in question at New Orleans alone, to say nothing of Memphis where the same condition of the market substantially existed.

It is also reasonably shown by the evidence that had the vendees supplied themselves at all with the coal in question, it must have been at the Memphis or New Orleans prices as proven. Memphis and New Orleans are the great coal marts on the Mississippi; these marts (ante, p. 19., etc.) are supplied by Ohio river and Grand

Tower coal; the former was cut off by low water; the latter was withheld and denied—where then could the vendors have supplied themselves? These Memphis coal dealers knew not, else the high market rates would have justified Wilmot, Tyler et al. in importing it; speculators along the Mississippi knew not, otherwise the laws of business would have prompted them to ship it: St. John swears (ante, p. 17,) it could not be had—no means of getting it; Phillips says (p. 18): not at Cairo, not within 100 miles of Grand Tower—he might just as well have said not within 1,000 miles; for the fact is, as fairly inferred, if not expressed, it could not be had at all—coal contracts for 15,000 tons a month are not easily obtained—each coal company has its own special customers who must be supplied and they in turn have their own special retail dealers.

The only solution of the question that can be offered is the one to be found on page 57 of the learned counsel's argument; he says in effect: "I admit all other sources failed you; but you do not show but what you might have gotten it from our company outside of your contract." Among all the strange theories suggested by the ingenuity of counsel, this is certainly the most extraordinary and remarkable. Strange and most unjust law, indeed, that would compel these vendees to waive their legal right to coal at contract price, as they certainly would do if they followed the learned counsel's advice (Price vs. McGown, 10 N. Y. 465; also 2 Barb. 270, 277.); and humbly beg this company, that had persisted in violating its first contract, to make a new contract at advanced rates, in order to lessen the company's damages for the first breach and enable it more cheaply to persist in violation of its first contract!

"There are stranger things in Heaven and Earth than are dreamed of in our philosophy;" yet even Shakspeare would have marveled did any court in Christendom enunciate such law. And yet, grant that it is the law; Mr. Olyphant says (ante. p. 15): "Contract or no contract, they will get no more coal from us;" and Mr. Driggs' evidence (p 16) shows that even a small quantity of coal to move Grand Lake out of danger was denied to these vendees. This evidence was objected to by the learned counsel as irrelevant, but now, in itself, answers his own argument and must convince any reasonable mind that no coal could be obtained by the vendees from this company.

I would also suggest that if the company were willing to furnish coal outside their contract, was it not equally incumbent upon the company to say so? It was for their benefit, and why compel the vendees to go to the company?

As bearing upon the question of damages, I also call the attention of the court to the fact that this contract was not an ordinary contract of bargain and sale of coal. It is a special contract containing many—*all* the mutual covenants heretofore enumerated; chief among which is that covenant which obligated, nay, compelled defendants in error to keep their vast coal fleet in readiness to receive this coal, or render themselves liable to pay liquidated damages (ante. p. 3). Admitting then, that coal was accessible, (which was not the fact) is it right, is it just, is it law, to compel these parties to withdraw their coal barges and put it in the power of this company to exact liquidated damages, by sending them elsewhere to seek after and contract for coal—and that, too, before they really knew whether

or not they were going to get the coal from the company. It is a noticeable fact in this case that this company—its president, while he continued to write to his Superintendent Driggs (ante. p. 15) "contract or no contract, they will get no more coal from us," had not the manliness to say to these gentlemen "we will give you no more coal, but will excuse you from keeping your barges here in order that you may, if possible, get coal elsewhere, and thereby lessen your damages, and thus relieve the company." Instead of this he studiously keeps Phillips and St. John in a state of uncertainty—says to Phillips (ante. p. 11), "when your barges are loaded you will know whether you are to have any coal or not"—tells St. John (Rec. 97) the same thing and refuses to "discuss" whether he will or will not give them coal—writes to Driggs (ante. p. 15), in effect, "don't tell Phillips and St. John that it is our purpose to deliver them no more coal; don't come to a rupture yet; get all you can out of them first." Driggs, true to his instructions, when asked for coal, says (ante. p. 12, Rec. 115): "I can't give you any coal this week." And thus it was Phillips and St. John were in daily expectation of coal from the company, and were forced, by the terms of the contract, not to withdraw their coal barges to seek coal elsewhere, even if it could have been obtained.

I admit the "*rule of law*" as stated on page 60 of counsel's argument, but deny its applicability to the case at bar; *here* the vendor had it in its own power to lessen the indemnity, but willfully disregarded its own interests; *here* the vendees were not required to hazard further loss in the way of liquidated damages by send-

ing their coal barges elsewhere in search of coal, in order to help the vendor that refused to *help itself; here* the evidence shows that the coal *could not be had*, except at vendor's mines, and even there it was declared "contract or *no contract* the vendees should have *no more coal.*"

I admit the "general rule" as stated on page 61 of counsel's argument; but insist, and think I have shown, that it does not apply to the present case.

I deny the legal effect of the evidence as stated by counsel on pages 58 and 59 of his argument. All that Phillips or Pratt knew about sales of coal by the company was from rumor and hearsay; Driggs himself, the company's own superintendent, and fully informed on the subject, testified (Rec. 152 and 151): that "no coal was sold at Grand Tower other than the coal sold by the company;" that the company only sold to the Memphis Packet company and St. Louis furnaces and outside boats; that three-quarters of all it sold was delivered to said Packet company and furnaces under contracts made in January; that the remainder was sold to boats at $4 per ton, but he "could have got more for it" if he had asked it. This was the only evidence of a market *at* Grand Tower; and proved *no* market, as before shown.

III.

The alleged "errors in matter of pleading" can not be sustained.

Mr. Stephens, in his work on pleading, p. 144, [note 16], says:

"Should it (the declaration) contain two counts, one of which is bad and the other good; and the defendant's plea, also bad, goes to the

whole cause of action, the plaintiff is entitled, on demurrer to the plea, to a judgment on his good count, notwithstanding he has committed the first fault in pleading." Ward vs. Sackrider, 3 Caines' Rep., 263; Tubbs vs. Caswell, 8 Wend., 129; Spring vs. The Bank, etc., 10 Peters (U. S.), 257; Hendricks vs. Reinback, 33 Ill., 299; Nickerson vs. Sheldon, 33 Ill., 372; *vide* also the five Illinois cases cited, ante. p. 40, where it is *also* held that "*a demurrer to a plea can not be carried back to a count which it does not purport to answer.*"

"In Aurora City vs. West, 7 Wallace, 92, it is also said, in respect to this practice of carrying demurrer back to antecedent pleadings, "*You can only do so, as to defects of substance;* as it is well settled that the rule applies *only* where the antecedent pleading is bad *in substance*, and it does not extend to matters of form * were *formal objections will* not be noticed."

Therefore (ante. p. 29 and authorities just cited) plaintiff in error, to sustain its point now under discussion, must show that not only one, but both the original counts, and not only both the original counts, but both the additional counts, are each and all of them bad in *substance*; bad in that which "goes to the very right of the action." In other words, if either of the two additional counts (ante. p. 6 and 7) are good in *substance*, no error was committed in refusing to carry demurrers back, etc.

Protesting that both "original" and both "additional" counts are good, and that (aside from the one objection hereinafter next referred to) all of the learned counsel's objections (p. 61 and 62 of his argument) go rather to matter of form and mode of expression, than to the substance—"*the very right of the action;*" I beg leave simply to call the attention of the Court to the objections urged against the additional counts; for, to answer them is, in law at least, to answer his whole argument on the point in hand.

(1) Counsel objects, that, in 2nd additional count (which claims *actual* damages for non-delivery in Nov. of the coal carried over, by election, from October) it is not shown that plaintiffs were ready and willing to receive the *regular* Nov. quota also; and that the third additional count (which claims actual damages for non-delivery in December of the coal carried over, by election, from November) is "obnoxious to the same objections that are made" to the 2nd additional count"

I insist that these objections are fully met by what has already been said in regard to "the true construction of the contract." The quantity of coal "elected" to be taken "instead of" "the liquidated damages," and to which *the law* "fixes and fastens" actual damages, is separate and distinct from the regular "monthly quota" to which "*the contract*" "fixes and fastens the liquidated damages," according to counsel's own admissions, p. 48 of his argument, *although both*, in point of fact are deliverable in the *same* month; and the two being thus *separate* and *distinct—actual* damages for the *one*, and *liquidated* damages for the *other*—I'am unable to discover by what principle of law or logic counsel can compel the plaintiffs, in a count to recover the *actual* damages attaching to the one, to also establish their right to recover the liquidated damages attaching to the other by also showing that they were also ready to receive this other, the receipt or non-receipt of which is immaterial to the issue. The averments of general performance as contained in both the counts are a sufficient answer to the objection, in any view of the matter.

(2.) Counsel objects that these counts proceed for "*a declared loss of profit*," etc. I cite the court to the

"Father of Pleading," (Chitty's pleading, vol. 2, p. *270 and *271), also case of Stevens v. Lyford (7 N. H., 361), where a precedent for this form of pleading, even in ordinary action of vendee vs. vendor, will be found.

(3). Counsel objects (*lastly*) to the *mode of expression* adopted by the pleader in making claim for this "profit" which plaintiffs would have realized on the coal—viz: (as averred in 2nd additional count) "*from* (the last day on which the coal was deliverable) *and after*" that time—and (as averred in 3rd additional count) "*on* (the last day in which the coal was to be delivered) *and after*" that time. My reply is that the thing averred is "the profit"—the mode of expressing or determining it is fixed by the court according to the law and the evidence. Admit, however, for the argument, that the pleader might have adopted a more technically correct mode of expressing it, and that the enquiry is material to the substance and "very right of the action," the words "*and after*" in both of said counts can well be rejected as surplusage. It is the well settled law of Illinois by repeated decisions, and the law everywhere so far as advised, that "when a count contains two averments, one good and the other bad, the bad averment should be disregarded, as it does not vitiate the whole count. *Utile per inutile non vitiatur.*" The whole of the averments as to when the coal could have been sold or the profits made might be stricken from the counts as unnecessary and as mere surplusage, and the counts would still contain all the averments essential to a good cause of action.

The only remaining question arising upon the pleading relates to the 4th plea. Counsel tells us (p. 64

of his argument) that this plea is good, because it presents "a defense," viz: it is good because *it is good* I regret that his reasons (if any there are) for this *ipse dixit* are not stated. Are they based on general principles of law, and if so what principles? Or are they based on some special provision of the contract itself, and if so what provisions? He omits to tells us anything on the subject outside of what the plea itself discloses, which is indefinite and uncertain. I am quite sure the plea can not be held good either on "general principles" or "special provisions" of the contract.

(1). Not on general principles, because the covenant, for breach of which the action is brought, and the covenant, breach of which is sought to be plead in bar of the action, are wholly independent covenants—neither is dependent on the other—each goes to a part only of the consideration on both sides—and a party who has failed to perform some part of a contract is not precluded from recovering if that part was not a condition precedent; Parsons on Contracts, vol. 2, pt. 2, ch. III, sec. III, * 190, 4th Ed. and note; Thomas vs. Fleury, 26 N. Y., 26; Grant vs. Johnson, 5 Barb, 161; McCullough vs. Cox, 6 Barb., 389; also 47 Barb., 574; and DeWolf vs. Crandall, 1 Sweeney, 556.

(2). The last two covenants of the ninth article (ante. p. 3, Rec. 20 and 21) are the only provisions of the contract bearing upon the point under discussion; and upon *both* of these covenants the plea is evidently based; it is therefore "*double*" and the special cause of demurrer assigned (ante. p. 10) ought to be sustained. The two covenants aforesaid read as follows:

"And it is further mutually covenanted and agreed that if the parties of the second part shall in any month fail to make payments for

coal received and the use of barges and other property leased from the party of the first part, sold, worn out or destroyed, or fail to pay maturing obligations as provided for herein—the party of the first part shall be released from any obligation to make further deliveries of coal. And it is further mutually covenanted and agreed that, if either of the parties hereto shall, for the period of two consecutive months, neglect to perform its engagements as herein set forth, the party not in default shall have the right to declare this contract null and void, and shall thereafter be released from all further obligations in the premises."

The words "*and indebtedness*," italicized, at bottom of page 63 of the learned counsel's argument, are mere "*interlopers*." The plea craves oyer of the contract as set forth in *haec verba* in the declaration, and the contract is before the court, *and the contract contains no such words.* The language of the contract is "maturing obligations," and *not* "maturing obligations and indebtedness" as counsel has it. If plaintiffs fail to make payment for coal or use of barges and other property leased, sold, worn out or destroyed, or fail to pay "maturing obligations," but not otherwise ("*Expressio unius exclusio alterius*") the company "shall be released" etc. The defaults complained of in the plea are not failures to pay for coal received or use of barges, etc., or failures to pay maturing obligations. "Maturing obligations" were not "liquidated damages" as claimed in the plea. The fifth article of the contract (ante, p. 3) provides for a monthly settlement between the parties for "the coal delivered and use of barges," etc. (liquidated damages are not included), and the amount due paid in cash or by "acceptable paper" at four months. This "paper," if given, would be maturing from month to month, during the contract—this "paper" is what the parties meant by the words "maturing obligations." If "maturing obligations" mean the obligations to pay liqui-

dated damages, then, they mean any and *all* "obligations" under the contract--if they mean any and all obligations under the contract, then they mean the " obligations " to pay " for coal delivered and for use of barges," etc.--they can not mean these, because *they* have already been specifically mentioned—therefore "maturing obligations " do *not* mean " liquidated damages ; " and the plea is bad, if founded on the first of said two covenants. It is equally bad if founded on the last covenant. *That* covenant uses language broad enough (and covers perhaps the defaults averred in the plea)—*all* " *engayements as herein set forth* "—and in that respect is in marked contrast with the special and restricted words used in the covenant just discussed ; but this " last " covenant merely gives a right--a *privilege*, to determine the contract, and does not in itself, *ipso facto*, determine it, unless the party not in default so " elects " ; and such "election" must be made with all due promptness, (Lowber vs. Selden, 11 How. N. Y., 526 ; also 35 Barb., 602); and, if after knowledge of the breach, the party in default is permitted to proceed, it is a waiver of the right to rescind the contract, (3 Johns., ch. 23 and 17 Johns., 357). There is no averment in the plea that defendant ever declared, or elected to declare, or intended or wished to declare, " the contract null and void "—therefore the plea was unquestionably bad and the demurrer properly sustained to it. Furthermore, Mr. Olyphant's letters (ante. p. 15) show not only that the company never did assume to declare the contract void on account of the matters averred in the plea ; but that they would have done so very quickly, if these matters stated in the plea were true.

IV.

"Errors in respect to evidence" are all fully answered by brief of defendants in error (ante. p. 3), and what has been already said in the argument.

As to the "letters;" abstract justice requires that the admissions of the company's president—he who signed the contract and whose control over the affairs of the company were so supreme that he could even create a sub-agent (Driggs) of "*absolute power*," as counsel expresses it and admits (p. 59 of his argument)—should be admitted as evidence against the company; and the law is so stated in 18 Ill., reports, 297, where it is said:

"The admissions of the president of a corporation, made in the execution of his duties, about the business of the company, within the scope of the authority usually exercised by him, will be evidence against the corporation. The ordinary affairs of a corporation, such as custom has imposed upon or necessity requires of the president of a corporation, may be performed by him without express authority."

These "letters" and conversations then must be viewed in the same light they would be if the suit was against Olyphant himself; and, to say that *such* language as finds expression in these letters and conversations, written and spoken at and about the time in controversy, do not, in some *remote* degree at least, and as matter of just inference, *tend* to show the general condition of the market at Grand Tower and admissions of defendant as to plaintiffs' ability to receive the coal, and are wholly "incapable of affording *any* reasonable presumption or influence as to the principle fact or matter in dispute," is to say something beyond comprehension.

As to "the questions involved in the assignment of the seventh error," the same being the counsel's seventh

point (p. 68 of his argument), I reply that the only foundation he has in the record to support this supposed error, or whereon to found his assertion that he was "*prevented* from proving the circumstances under which these letters were written," (which circumstances he proposed to prove by a witness who had already said *he couldn't tell anything* about it), is to be found on page 148 of the record, and reads as follows:

"The witness was next asked by counsel for defendant to state to the jury under what circumstances that correspondence from Mr. Olyphant was given, and about the difficulty with Phillips and St. John about the time those letters were written and previous to it. The witness' answer to this was, '*Can't tell.*' Counsel for defendant then asked witness: '*Don't you know that Phillips and St. John had been bothering the company?*' Plaintiffs objected to *this question* as improper and the court then said, in the hearing of the jury: *The letters show the circumstances under which they were written, sufficiently, and decided the question was improper and thereby the defendant was debared of the answer as evidence.* To this remark in regard to the letters and the ruling of the court in regard to said question, *the defendant*, by its counsel, *then and there excepted.*"

This is *all* there is in the record *excepted to at the time*, which furnishes color for the learned counsel's visionary imaginings of wrongs and injury and "what *might have been*," set forth on the four closely printed pages devoted by him to the discussion of this point. The questions, striped of the coloring with which counsel's vivid imagination has invested them, reduce themselves to two simple propositions, viz: 1st. Was the said question (above italicized) a proper one?—was it material to the issue whether Phillips and St. John had or had not "*been bothering the company?*"—was it proper for the jury to go into an investigation of, and incumber the record with, this wholly immaterial mat-

ter? We say, "no." And, even if it was, the witness had already said he "couldn't tell" the jury anything about the matter, and the court, in its discretion had therefore a right to limit this needless consumption of time. 2nd. Was it wrong for the court to have made the remark it did? We again say, "no." The letters were admitted as admissions of defendant and the court had already told the jury (ante. p. 16) that they had no application unless, etc. As admissions, the letters *did* show the circumstances under which they were written sufficiently, and no oral proof could vary or change whatever force or effect, if any, these letters did have *as* admissions. A written admission can not be varied by oral proof. The "circumstances under which the letters were written" (even if the witnesses had *known* them, as he did not), as also the fact that plaintiffs "had been bothering the company" (even if the witness had so testifisd) were both wholly immeterial.

In his discussion of this branch of the case, his 7th point, the learned counsel has suffered his very vivid imagination to draw certain inferences as to the circumstances under which these letters were written; which inferences, if justified by the record, cannot affect this case, in which it stands admitted by the record that the company has no legal defense; but which inferences are *not* justified by the record, as I shall undertake to show, when I come to speak of the 'merits of the case." The remaining objections in respect to evidence, I leave where our brief leaves them (ante. p. 33. [2].), with the humble self-assurance that none of them can be sustained.

"A judgment will not be reversed because the court below admitted improper evidence, if sufficient legal evidence appears in the record to

sustain the verdict ;" *Shultz vs. Lepage* 21 Illinois 160.

"Where it appears from the record, no exception was taken to the admission of the evidence complained of, such evidence will be regarded as *legitimate and proper ;*" *Nathan vs. City of Bloomington*, 46 Ill., 347.

"The improper admission of evidence, but which is not pertinent to any issue in the case and could not mislead, will not cause a reversal;" *Mattingly vs. Crowly ;* 42 Ill., 300.

"The admission of improper evidence will not cause a reversal, if its effect is so far restrained by instructions that it could not affect the verdict ;" *City of Champaigne vs. Patterson*, 50 Ill., 61.

"Rejecting competent evidence, the record showing that it did not change, or that it could not properly change the result, is not error ;" *Rowley vs. Hughes* 40 Ill., 316.

The above authorities but support the general principles of law laid down, substantially, by this Honorable Court in the cases cited in our brief (ante. p. 34); and such being the law the said evidence admitted or refused by the court below cannot in any view of the case be assigned as error, or, if error, reverse this case; for, whether the same be admitted or excluded, the result must have been the same ; and the evidence not objected to was sufficient, without that objected to, to justify the verdict.

V.

"Errors in regard to instructions refused," being the 11th assignment of error, go to the whole charge as asked. If any one of its several propositions were bad, the alleged error cannot be sustained. The learned counsel himself has no good word to say in support of these instructions. The assignment of error is so palpably bad that I am content to refer your Honors to our brief (ante. p. 34), and not trespass longer upon the time of the count in its discussion.

VI.

"Errors pertaining to instructions given," are virtually disposed of in and by the discussion in regard to the "construction of the contract" and "measure of damages."

The learned counsel makes three objections to these instructions.

(1.) He contends that the measure of damages should have been "the liquidated damages specified in the contract." This objection I submit to the judgment of the Court, without further argument and with the well-grounded conviction that it can not be sustained.

(2). If not liquidated damages, says counsel, then the measure of damages should have been the difference between the contract price and the market price as proven at Grand Tower—in other words, the difference between what defendant contracted it for to plaintiffs and what defendant sold it for to others; for this, I submit, would be the legal effect of the evidence, since, it must be admitted, that the only market proven at Grand Tower was the defendant's own market and the defendant's own prices.

We insist, as before argued, that whatever be the rule of law adopted by this Honorable Court—whatever technical or even substantial error, if any, may be found in the instructions given by the learned Judge below, the evidence of market prices at Memphis and New Orleans was properly admitted; and, being properly admitted, it was and is proper to consider them as "establishing" the market value of the coal, not only "at or below Cairo," but also "at Grand Tower." This conceded, we insist that what the company received for its coal at Grand

Tower from Memphis Packet company and St. Louis furnaces *under prior contracts*, and what the company received from passing steamboats for coal *at* $4 *a ton*, when it admits it could have "got *more*" than $4—(which was *all* the coal that *was* sold at Grand Tower—all there was there to make a market)—can not legally or justly be taken into the estimate in determining the *true market value* of the coal at Grand Tower. Therefore the only evidence before the jury as to the real market or cash value of the coal at Grand Tower was the evidence of its market value at Memphis and New Orleans, and of what it cost to put it in those markets from Grand Tower. It being right and proper for the jury to *consider* this evidence, and it being the *only legal* evidence before them upon which they *could* base a verdict, the court, even had it been of the opinion that the damages should be measured by the market value of the coal at Grand Tower, could unquestionably have instructed the jury as in Hazleton Coal Co. vs. Buck, etc., company, that, if they believed from the evidence that there was "no general market for sale of coal at" Grand Tower they "would have a right to take the prices in the market of sale and to deduct from this the cost of transportation from" Grand Tower "in order to find a fair price at" Grand Tower; or, with still greater propriety, the court might have said to the jury, as in Stevens vs. Lyford: "The case does not find any market price at" Grand Tower. "There were none sold there except what defendant sold to make a market price." "The only way" for you "to assess the damages" is "to resort to the evidence offered" as to the market price at Memphis and New Orleans and cost of

transporting it thither from Grand Tower, "and in that way to ascertain the value at" Grand Tower.

In point of fact did the court do more than this? There was no coal sold at Grand Tower except what defendant sold (Rec. 152) to make a market. "The case"—the law, then—"found no market price at" Grand Tower. The "cash value" "at Cairo or points below it on the Mississippi River" could, under the evidence, have been none other than the prices as proven at Memphis and New Orleans. The cash or market value at Grand Tower could, under the evidence, have been none other than the prices as proven at Memphis and New Orleans with "expense of transporting it thither" deducted Therefore, according to the legal effect of the evidence, the cash or market value of the coal at Grand Tower was its cash or market value "at Cairo or points below it on the Mississippi River" with "expense of transporting it thither added;" and this was what the Court told the jury, cautioning them in addition to this to also make "due allowance for the risk and hazard of such transportation." Concede, for the argument, that the measure of damages is as counsel claims, viz: "the difference between the contract price and the market price at the time and place where the company was required to deliver it;" what fairer mode of determining that market price at the "place," etc., than the one adopted by the court, viz: "the cash value at or below Cairo" where there was a market for the coal, with "cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation," when the evidence showed, without contradiction, beyond doubt, and as matter of

fact and law, that no coal was sold at the place of delivery, "except what defendant sold to make a market?" How much more just is it to take the cash value of the article where there was a general market for it and everybody bought and sold, and deduct from it what it cost to get it there and the risk itself even of getting it there, than allowing the jury to measure the damages by what the defendant alone sold it for at a place where defendant alone sold coal The law establishes "general principles" which when applied to individual cases will most usually tend to promote justice. The general principle involved in the case at bar (regarded simply as an ordinary action of vendee vs vendor) is: "Can a vendor himself and alone make a market by which to measure the damages of his own vendee?" Let this Honorable Court once lay down the law as proclaimed by the learned counsel and which in effect establishes the affirmative of the above proposition, and it will open up a wide and inviting field for fraud to coal corporations who own all the coal in the vicinity of their mines. They can then violate their contracts with impunity—send their coal to distant markets where there is a scarcity and prices rule high, while at their *mines* (the place of delivery) they dispose of small quantities to special customers only, at nominal rates, and thereby reduce the damages of their vendee. Most assuredly justice and the interests of the commercial world demand no such rule of damages as this.

The 'continued sales' at Grand Tower that counsel so eloquently discourses about (p. 60, etc., of his argument) were sales by the defendant (150—153) to the

Packet Company and Furnace companies and steamboats.

Did the price paid by the Packet or Furnace companies prove or tend to prove the *value* of this coal at Grand Tower at the time in question? I answer, "no," that was the contract price nine months before. Did the price paid by steamboats prove or tend to prove the real value of the coal at Grand Tower at the time in question? I answer, "no." because defendant's own superintendent swears (Rec. 153) that he could "have got *more* for it if he had thought it policy to put up the price"—however, putting up the price would have increased the damages which the company would have to pay plaintiffs, *therefore* it was *not* "policy to put up the price." If neither of tnese proved or tended to prove the market price at "*the place*," etc., then there was no price proven; and the "only way to assess the damages was to resort to" the prices as proven at *or* below Cairo. Did the prices at or below Cairo, where everybody sold and competition was free to all, with cost and hazard of transportation deducted, establish the real value of coal at Grand Tower? I answer most emphatically "yes, with almost mathematical certainty." The law presumes in *every* case of vendee vs. vendor and vendor vs. vendee that an article is worth just what it is selling for in a general market. Take that price and deduct just what it would cost to get the article to that market from the place of its production, and then make due allowance for the hazard of getting the article to its place of destination, and you have arrived at the true and real value of the article *at*

the place of production to a degree approaching almost moral certainty.

As respects, then, the true measure of damages for non-delivery of coal, the charge as given was according to "*the legal effect of the evidence*" even though the "general rule" applicable to all actions of vendee vs. vendor be adopted. On the other hand, if the court is of the opinion that the case at bar is, as contended for by defendants in error, viz: a case of sale of "*goods purchased for a particular market and that known to both parties*," or a case of "*special contract*" in which plaintiffs are entitled to recover "*all their actual damages, gains prevented as well as losses sustained,*" that were "*reasonably within the contemplation of the parties at the time they made the contract*, "the measure of damages adopted by the court below were far too favorable to defendant than otherwise.

(3.) Counsel objects to the additional damages allowed plaintiffs on account of detention of tow-boats. In reply it may be said:

1st. That the contract compelled them to have vessels to receive the coal in question, and to pay rental for, repair, insure and keep in good order, these vessels, all of which necessarily entailed great expense upon plaintiffs, and in case they were kept idle on account of failure to get coal, materially enhanced plaintiffs' loss. This loss, as respects detentions on account of non-delivery of the regular quotas of coal, was estimated by the parties themselves at $50 a day for each day either of the tow-boats were detained. But, as respect detentions on account of the coal "elected" to be taken in a "succeeding month," the damages, as in case of failure

to get the coal itself, was left unprovided for, the parties having only undertaken to negotiate and agree upon and liquidate the damages on both sides in respect to the regular quotas.

2nd. That the 2nd original count claimed these liquidated damages for detentions in October and November occasioned by the non-delivery of the regular quotas for those months; and all the remaining counts claimed actual damages for detention of vessels in November and December occasioned by the non-delivery of the "elected" coal deliverable in those months.

3rd. That, if the company failed to deliver any coal at all during October, November and December, and in consequence thereof plaintiff's vessels were detained during all those months; then, under the pleadings, plaintiffs were entitled to recover the liquidated damages for the detentions in October, as claimed in the 2nd original count; and actual damages for non-delivery of coal together with actual damages for detention of vessels in December, as claimed in 3rd additional count; and actual damages for non-delivery of coal, as claimed in 2nd additional count (also 1st and 2nd original counts) together with *actual* damages for detention of vessels in November, as claimed in 2nd additional count (and 1st original count) *or liquidated* damages for detention of tow-boats in November, as claimed in 2nd original count, but not ***both***, as it would be unjust to allow a double compensation for the detentions in November, viz: actual and liquidated damages, for the same thing.

4th. As respects *actual* damages for detention of vessels, there was no evidence upon which the jury *could* assess the damage, except the contract itself, where-

in the parties themselves had estimated and valued the damages for like detentions occasioned by non-delivery of the regular quotas, at $50 a day for each day either of the tow-boats were detained; and, this contract being the only evidence the jury had whereon to assess the damages, the legal effect of the evidence made the damages $50 a day for each day either towboat was detained in consequence of non-delivery of the "elected" quotas in November and December. In other words, the law of the case and the legal effect of the evidence was to give plaintiffs $50 a day either as liquidated or actual damages, for each day either of their tow-boats were detained in October, November and December.

In the case of Bevans vs. U. S. 13, Wallace, 57, as also in the case of Improvement company vs. Munson, 14 Wallace, 442, this Honorable Court has already decided that an instruction which is "*according to the legal effect of the evidence*," is right and proper. So, in the present case, the charge, as given, being "according to the legal effect of the evidence," no reversal can be had, even if the instructions are not technically correct.

"Where the charge is sufficient to present the whole controversy, it is no cause of reversal that instructions not given by the court were correct in the abstract;" The Schools vs. Risley, 10 Wallace, 91.

"The court will not reverse because instructions asked for, even if correct in point of law, were refused, provided those given covered the entire case and submitted it properly to the jury;" Laber vs. Cooper, 7 Wallace, 565.

"Where an instruction, though not in the best form of words, is sufficiently intelligible and has been rightly interpreted by the jury in reference to the evidence, a reversal will not be ordered in the indulgence of a nice criticism;" Rogers vs. The Marshal, 1 Wallace, 444.

"If the instruction was ambiguous defendant ought to have asked

the court to make it clear, before the jury leave the bar, or he can not afterwards complain of it;" Improvement Company vs. Munson, 14 Wallace, 442.

"Objections * neither taken at the usual stage of the proceedings nor prominently presented on the face of the record, but which may be sprung upon a party after an apparent waiver of them by an adversary, and still more, after a trial upon the merits, can have no claim to the favor of this court, but should be entertained only in obedience to the strictest requirements of the law;" Roach vs. Hulings, 16 Peters, 321.

"Where a charge is excepted to *en masse*, the exception will not be sustained if *one* of the propositions be correct;" Rogers vs. The Marshal, 1 Wallace 444.

"An instruction is not erroneous because it assumes there was no evidence tending to establish a proposition when such was the fact;" Sharp vs. Parks, 48 Ill., 511.

"An instruction which standing alone might mislead, but being connected with others which properly limit and qualify its meaning, so that it is clear the jury were not misled, is not a ground for reversal;" Ill. C. R. R. Co. vs. Swearengen, 47 Ill., 206.

"The mere fact that an instruction is not well expressed, will not cause a reversal where it could not have mislead;" Pierce vs Hasbrouck, 49 Ill., 23.

"Where instructions have been given, which, though erroneous, could not have mislead the jury to the injury of the plaintiff in error, this court will not on that account disturb the judgment of the court below;" Howard F. and M. Ins. Co. vs. Cormick, 24 Ill., 455.

Apply to the case at bar, the foregoing principlest which have the endorsement of this Honorable Court, and the courts of the State where the cause was tried, and it must be apparent that none of the errors assigned on account of instructions can be sustained. The charge given must be considered in connection with the evidence and *the contract itself which was before the jury.* So considered it substantially, at least, gave to the jury the law of the case, and the jury could not have been misled by it. The "one issue" was presented to the jury

with sufficient clearness; nor could the jury have done otherwise than find this issue in favor of the plaintiffs; and the court would have been justified in telling them, in an absolute form, to so find. And, as respects the only remaining question, the "assessment of damages," defendant, in effect, said to the court, (Rec. 176 and 177), "I find no fault with the instructions, except that *the* "*contract fixes the measure of damages and you should* "*make the charge conform to that rule;* and except "also that you are giving the jury to understand that "plaintiffs have made claim for liquidated damages for "detention of tow-boats, whereas they make no such "claim in any of their counts." These were the only objections urged, the only exceptions taken, and the only reasons given to the court below. Ought defendant, then, be permitted to come into this court and assign other objections, take other exceptions and give other reasons? Surely justice to the court below, as well as justice to these plaintiffs, required of defendant, when it undertook to state its objections, to state *all* of them. The principle of "***Expressio unius exclusio alterius***" is just as applicable here as elsewhere. If defendant had other objections, he had no right to keep silent and then spring them upon the adversary in this court. Had he spoken, the court below might have corrected the instructions so as to obviate such objections The principle of estoppel may be properly invoked: "If a person maintain silence when in conscience he ought to speak, equity will debar him from speaking when conscience requires him to be silent." The exception taken to the whole of said charge as being "improper and misleading," without stating wherein it was "improper and misleading,"

must be classed in the same category as a "special demurrer" which "fails to assign the cause of objection." There is no difference in principle. In addition to all this, the errors assigned as to specific parts of instructions are in some respects broader than the exceptions taken (as indicated in our brief, p. 35); in other words, the errors assigned have no corresponding exceptions taken. In no wiew of the case, then, can the alleged errors as to instructions be sustained.

VII.

I pass now to "*the real merits of the case.*" My confidence in this point alone (regard of errors in the record), the magnitude of the interests involved, and the vital importance to our clients that the Appeal Bond securing the judgment below should not be discharged by a reversal of this case upon some technical error, if such *should* be found in the record, furnish, I trust, ample apology for pressing upon the attention of your Honors the point now in hand, and which, in my humble judgment, ought to be decisive of the case. Not, that we fear the ultimate result, as respects the verdict and judgment in a trial *de novo*, should one, unfortunately for our clients, be ordered; but we fear, have good reason to know, and the fact hardly admits of a doubt that, owing to embarrassments of this company, recent suspension of work at its mines, possession of its property by trustees under first and second bonded mortgages, and foreclosures now pressing upon it in the interests of the bondholders, who are also stockholders, no judgment hereafter rendered would avail our clients These facts and this danger which threatens, are matters *dehors* the record, I admit; but they are veritable truths never-

theless, susceptible of proof and vouched for on professional integrity, as the firm convictions of the counsel that utters them, as a justifiable excuse for further taxing the time of your honors in this prolonged investigation of the case. The following candid statement of facts as proven by the record is respectfully submitted.

A solemn contract under seal (ante. p. 2—4) is entered into between the company and our clients, the avowed object and purpose of which (as no candid mind can doubt) was to supply our clients with sufficient coal, (and sufficient transportation—tow-boats, tugs, barges, ropes, chains, etc., to receive. carry and sell this coal), to enable our clients to engage in, maintain and carry on a large and extensive coal business at and south of Cairo. The moving consideration to the company was the sale of its coal, rental and repairs and insurance of its barges, and non-interference with its business *above* Cairo. The moving consideration to our clients was the exclusive right to sell this coal at and *below* Cairo, and the "profits" that would, in due course of business, arise upon a re-sale of the coal at or south of Cairo, as best suited their interests. The repairs, insurance and rental of the property, the expense necessarily incurred in making preparations to comply with the contract, and the expense of employing men and keeping up establishments at Memphis and New Orleans, etc., to receive and dispose of the coal, required *a large "capital"* and in the nature of things, involved *enormous expense*, (as the undertaking itself shows). During the early part of the contract and to *September* 10, 1870, the coal market was depressed, and our clients, in an honest endeav-

or to fully perform *their* part of the contract, undoubtedly "lost money," (ante. p. 15). During the entire existence of the contract (as *all* the evidence discloses) and from first to last, our clients complied with *every* demand, legal and *illegal*, just and *unjust*, except payment of certain "*boat yard bills*" (Rec. 97) demanded by the company; which "*boat yard bills*" were (Rec. 97) "*outside the contract*"—had nothing to do with the contract; which "*boat yard bills*" remained unpaid *only* because (Rec. 97) the company refused to consider our clients' *counter* "claims" against the company; which "*boat yard bills*," even unjust as they were, Mr. St. John was willing to "arrange" and offered (Rec. 97) to pay if Olyphant, president of the company, would only promise to deliver the coal; but Olyphant, using this matter *dehors* the contract as a mere pretext (his *only* pretext—conversation with Phillips, Rec. 108, and with St. John, Rec. 97) refused to even *discuss* the matter. So anxious were our clients to keep every covenant in the contract that they even paid, but under "*protest*" (Rec. 104), "penalties" unjustly extorted from them by the company. Outside of these "*penalties*" which they paid under protest and these "*boat yard bills*" "outside the contract" which they offered to pay and Olyphant refused to discuss, and neither of which, even if unpaid, furnished any ground for avoiding the contract our clients paid their rental, paid for the coal they got, paid the $30,000 note given by Phillips, and in *all* things fulfilled the contract, loosing money all the time.

In September the great coal channels of the Ohio became closed; coal commenced advancing; the market grew higher and higher; a golden field ("calculated

upon by business men " and earnestly looked forward to, ante, p 20,) opened up before our clients and presented to their anxious eyes a rich harvest—the only means whereby their limited fortunes, already sunk in the enterprise they had undertaken, could and would be retrieved. They send forward their coal fleet to receive the 15,000 tons due in October and which was to be delivered in the proportion of 500 tons a day; on the first day of the month they have barges moored according to contract, sufficient to receive "over 2.000 tons of coal" (Rec. 95, 124); the company failing to load, our clients demand of the company that it "fill up" the barges (Rec. 114), and the company replies: "We can't give you any coal this week;" the same demand is made daily until even the company's agent thought it "ridiculous" (Rec. 142), Oct. 11th arrives—no coal, no explanation yet; the number of barges have now reached 12, with carrying capacity of about 5,500 tons, the full quota for eleven days, (Rec. 106); Phillips comes in person to Grand Tower, sees the president of the company, and enquires (Rec. 108) why our clients "did not get coal;" Olyphant gives ' no satisfaction," refuses to "discuss" the question, and conceals his true purposes by dismissing Mr. Phillips with the exclamation. "When your barges are loaded you will know whether you are to have any coal *or not;*" barges still continued to arrive, and coal in the "markets of sale" continued to advance; October 15th the number of barges had increased to 16 or 17, with carrying capacity of about 10,000 tons—almost sufficient to receive the whole October quota—while other barges, 35 or more, with capacity of 20,000 tons, remain in waiting

below and available in 48 hours," the company's capacity to load being about 2 barges per day (Rec. 115, 116, 124, 143); these barges were moored in the *proper* place, were in *good condition* for receiving coal, and remained there until after December (Rec. 117, 124); Olyphant knew they were there and Driggs knew it, and *neither* ever objected to their sufficiency (Rec. 108, 115, 142); October 31, arrives and no coal—no explanation yet; Mr. St. John (Rec. 97 and 104) goes to New York to "see why we can't get this October coal;" Olyphant's only excuse is, "you have not paid the boat yard bill;" St. John offers to "arrange" them—offers to pay them, regardless of the fact that they are "outside the contrrct" and regardless of the fact that they are unjust, if the company will only promise to deliver coal, but Olyphant refnses to promise, refuses to "discuss the question" even, says: "You owe us for the September penalties," "not included" in our "monthly settlements"—pay *them*, and "you will know when your barges are loaded whether you are to get coal or not"—"if you don't like what I say clear out;" St. John thereupon notifies him of the election to take the October quota in November, "clears out," and goes the next day (November) and pays under protest even the unjust exactions "for September penalties;" the market goes up, the boats and barges remain idle, demands are still made for coal at Grand Tower of Driggs, the learned counsel's agent of "*absolute power*" (p. 59 of his argument); but no coal can be had—not even a small quantity (ante. p. 16) to extricate our towboat from danger; December comes, market still advancing, boats and barges and men still idle waiting for coal, and no coal yet (Rec. 125); the

November quota is elected to be taken in December (Rec. 113); December is gone and the contract is at an end for the year, and still no coal has been delivered; our clients bring suit to recover liquidated damages for detention of towboats in consequence of the non delivery of October quota in October and the November quota in November; also *actual* damages for non-delivery of October quota in November, and of November quota in December, viz: the difference between the contract price with cost and risk of transportation *added*, and the market value of the coal in the markets where they had agreed with the defendant to sell the coal, the great coal markets on the lower Mississippi and the only markets accessible to plaintiffs, also some reasonable compensation for detention of boats, etc., which could have transported the coal and for which they were paying a large rental, during the time they were thus charged with "cost of transportation;" their "second" and "third" "additional counts" (ante. p. 6 and 7) are alone sufficient in themselves to support a verdict for all they claim, except the liquidated damages for detention of towboats in October and November, and these are claimed in their "second original count" (Rec. 28). The only legal defense set up by the defendant is (ante. p. 9) that plaintiffs "did not furnish and deliver barges" to receive the coal; the only other defense legal or moral is (ante. p. 9) that plaintiffs owed certain penalties during "all of October and November;" the evidence *proves* the "*legal* defense" to be "*as false as Lucifer*," and also shows the "*moral* defense" to be its "*twin-brother*" (Rec. 104); the evidence also shows that the defendant *could* have delivered the coal in question if it had wished

to (Rec. 142), and that the refusal to deliver it was willful, deliberate, *premeditated*—determined on as early as September 1, re-affirmed September 10, reiterated September 30, and persisted in "*even unto the end*," though studiously concealed from plaintiffs until after their suit was brought; the letters (ante. p. 15 and 16) which establish these propositions are among the remarkable productions of the age—they contain admissions (ante. p. 16, Rec. 139) that defendant has *no* defense to plaintiffs' action, and is only seeking delay and forcing plaintiff to "encounter a large expense of time and trouble before they get" what is justly due them—they also contain proofs, "strong as Holy Writ," of a cool, calculating, willful and deliberate purpose to repudiate the contract and inflict all the damage defendant could upon plaintiffs, *right* or wrong—they blow away like chaff from the wheat, the subtle theories of counsel (p. 69 of his argument)—they add to plaintiffs' unquestionable *legal* rights a tower of *moral* strength—they strip defendant's case of *every* vestige of equity and good conscience—they convince Judge and jury, reason and understanding, that were there forty new trials the verdict must always be for the plaintiffs.

The only remaining question then is, has injustice been done the defendant in the assessment of damages? That the damages *are* excessive (provided plaintiffs' theory of the law be adopted) is not claimed by counsel in brief, argument, or assignment of errors; nor can such a proposition be seriously maintained. Defendant, as the *record* discloses had notice (in the declaration) of plaintiffs' purpose to prove the market value of the coal south of Cairo, and yet, upon the trial, it was

wholly unable to show any market at Grand Tower but the company's own sales under existing contracts and to steamboats at less than it could have got; nor was it in any manner able to disprove the market prices south of Cairo as testified to by plaintiffs' witnesses. What then were those prices, and what do they establish?

I remark here that I deem it unnecessary to determine the proportion or difference between "nut" and "lump" coal. The contract price of the former (ante, p. 3) was $1.50 a ton less than the latter, while Phillips testifies (ante, p. 18, and his is the only evidence on the point,) that the former sold in the market for $1 or $1.50 a ton less than the latter, thus making the profit on "nut" at least equal, if not greater than, the "profit on "lump" coal. It may also be observed that according to the contract (ante. p. 3) plaintiff's are entitled to a "rebate" or reduction of 25 cents a ton on every ton, if they provide barges to receive the coal; thus making the real contract price $2.75 for "lump" and $1.25 for "nut," and *not* $3 and $1.50, as the court below, through oversight, told the jury. I make mention of this fact not only for the purpose of fixing the contract price, but also to show that the instructions were "far too favorable to defendant." It will also be observed (ante, p. 18) that defendant's coal "rated" and sold in the market at $1 a ton less than Pittsburg coal. It will further be observed (ante, p. 17, 18, 19,) that transportation of coal from Grand Tower to New Orleans cost 35 to 50 cents a ton, and to Memphis 25 to 35 cents a ton. Take contract price of coal in question, and add cost of transportation and difference in market value between Pittsburg and defend-

ant,s coal; and the evidence shows the following result, viz:

30,000 tons coal at cantract price ($2 75)	$ 82,500
do do do highest transportation (50c.)	15,000
do do do difference between "Pittsburgh" and dfts coal ($1)	30,000
Total to be deducted from market prices "Pittsburgh" at N. O.	$127,500
30,000 tons coal at contract price ($2 75)	$ 82,500
do do do highest transportation (35c)	10,500
do do do difference between "Pittsburgh" and dfts coal ($1)	30,000
Total to be deducted from m'k't prices "Pittsb'gh" at Memphis.	$123,000

Having obtained these data (stated too favorably to defendant than otherwise, and concerning which there can be no dispute), two enquiries are suggested: First, what *were* the "market prices" proven? Second, what is the *law* as applicable to the proofs?

FIRST: As respects New Orleans market, the record apparently makes Mr. St. John testify as to prices there; but he was not at New Orleans during the time, and the reporter of the evidence undoubtedly misunderstood him in that regard, his evidence being directed solely to Memphis prices, at which latter place he made his headquarters. So the only evidence of a direct and reliable character as to the New Orleans market was that of Mr. Wilmont and Mr. Tyler, *both* of whom were and are coal merchants residing at New Orleans, and familiar with the coal market there. Their evidence shows mode of selling coal at New Orleans, was altogether by the barrel, of 180 pounds to the barrel, (and *not* by the ton of 2,000 pounds to the ton as specified in the contract, ante. p. 3); and, properly considered, establishes the correctness of the following figures, viz:

Wilmont (ante. p. 20, Rec. 154.):

30,000 tons coal at $1 25 per bbl. (or $13 89 per ton)	$ 416,700
Deduct cost, carriage and difference in price as above	127,500
Plaintiffs' net profit and loss according to Wilmont	$389,200

Tyler (ante. p. 21. Rec. 162):

9,000 tons (18 days in Nov.) at $1 per bbl. (or $11 11 per ton).....$	99,990
6,000 tons (Nov. 18 to Dec. 1) at $1 25 per bbl. (or $13 89 per ton).	83,340
15,000 tons (after Dec. 1) at $1 50 per bbl. (or $16 66 per ton).....	249,900
Market value of coal at New Orleans according to Tyler.....	433,230
Deduct cost, carriage and difference in price as above.....	127,500
Plaintiffs' net profit and loss according to Tyler.....	$305,730

Taking an average between Wilmont and Tyler, we have $347,465, as the amount, reasonably proven, of plaintiffs' *loss* had they supplied themselves with the coal in the New Orleans market, and of plaintiffs' *profit* had it been delivered by defendant and re-sold by plaintiffs in the New Orleans market, as they had an unquestioned right under the contract to do, and *could* have done, as testified by Wilmont (ante. p. 21, Rec. 160.)

As respects the Memphis market, plaintiffs themselves testify, and also Mr. Speed, a coal merchant of that place, familiar with the coal market there. Their evidence (imperfectly as it is reported—and no reporter *can* take down evidence as satisfactorily as one hears it from the lips of the witness) establishes the correctness of the following figures, viz:

St. John (ante. p. 17, Rec. 100):

7,500 tons (1st part of Nov.) at $11 per ton.....$	82,500	
22,500 tons (after that) at $15 per ton.....	337,500	
Highest market value..... .....$	420,000	
Deduct cost, etc., (and we have highest profits, etc).....$	123,000	$297,000

Or,

7,500 tons (1st part of Nov.) at $7 per ton ....$	52,500	
22,500 tons (after that) at $12½ per ton.....	281,250	
Lowest market value..... .....$	333,750	
Deduct cost, etc., (and we have lowest profit, etc.)	123,000	$210,750
The highest and lowest profit added makes.....		$507,750

which sum divided by 2 shows an average of $253,875, as plaintiffs' reasonable proofit and loss according to the evidence of Mr. St. John.

Phillips (ante. p. 18, Rec. 107):

5,000 tons (for small part Nov·) at $10 per ton.....$	50,000	
25,000 tons (greater part of Nov. and for Dec.) at $15 per ton.....	375,000	
Highest market value.....	425,000	
Deduct cost, etc., (and we have highest profits).....	$123,000	$302,000

Or,

5,000 tons (for small part Nov.) at $7 per ton.....$	35,000	
25,000 tons (greater part Nov. and for Dec.) at $10 per ton.....	250,000	
Lowest market value.....	285,000	
Deduct cost etc., (and we have lowest profits, etc.).....	123,000	162,000
The highest and lowest profit added makes.....		$464,000

which sum divided by two shows an average of $232,000, as plaintiffs' profit and loss according to the evidence of Mr. Phillips.

Speed (ante. p. 18, Rec. 165):

2,500 tons (for 5 days in Nov.) at $11 per ton.....$	27,500	
14,250 tons (for ½ bal. of time) at $12½ per ton.....	168,000	
14,250 tons (for remaining time) at $15 per ton.....	213,000	
Highest market price.....	409,375	
Deduct cost, etc., (and we have highest profit, etc.).....	123,000	$286,375

Or,

2,500 tons (for 5 days in Nov.) at $8 to $8½ per ton.....$	20,625	
14,250 tons (for ½ bal. of time) at $9 per ton.....	128,250	
14,250 tons (for remaining time) at $10 per ton.....	142,500	
Lowest market value.....	291,375	
Deduct cost, etc., (and we have lowest profit, etc.).....	123,000	168,375
The highest and lowest profit added makes.....		$454.750

which sum divided by 2 shows an average of $229,375, as plaintiffs' profit and loss according to the evidence of Mr. Speed.

Profit and loss according to Mr. St. John.....$	253,875
Profit and loss according to Mr. Phillips.....	232,000
Profit and loss according to Mr. Speed.....	227,375
These added make.....	$713,250

which sum divided by 3 shows an average of all the Memphis evidence to be $237,750, as the amount, reasonably proven, of plaintiffs' *loss* had they supplied themselves with the coal in the (only remaining market open to them) Memphis market, and of plaintiffs' ***profit***

had it been delivered by defendant and re-sold by plaintiffs, in the Memphis market as they had an unquestioned right under the contract to do, and could in all reasonably probability have done. And so, on the whole evidence, we find:

Average profit and loss based on				New Orleans	market	.....	$ 347,465
do	do	do	do	Memphis	do	.....	237,750
Add these sums and we have						.....	$585,215

and this sum divided by two gives us $292,607, as the actual amount of plaintiffs' loss, and the true amount of plaintiffs' profits, as based upon "*a range of the entire market and a general average of the prices thus found, extending through a reasonable period,*" (Smith vs. Griffith, 3 Hill, 338), to-wit: from November 1 to December 15, the same being the exact period during which the coal was deliverable under the contract. It is, however, more than probable that plaintiffs real loss and true profits do not stop here, inasmuch as prices continued daily to advance from October 1 until in *January* when coal arrived out of the Ohio, and plaintiffs would have enjoyed the benefit of the rise after December 15—they would have had control of the market, and therefore this is more than probable, even in the absence of Wilmont's positive evidence that 15,000 tons additional in market in one month would not have lowered the price.

(2). As to the law: The more just and the fairest rule is undoubtedly as stated in Smith vs. Griffith, 3 Hill, 338, where it is said: "In regulating damages, the law contemplates a range of the entire market and the average of prices as thus found, running through a reasonable period of time.

In the case of Blydenburgh vs. Welsh, 1 Baldwin, 331, Baldwin J, said :

" You must take what you believe the market price or value, but may take the range of the market as proved by the witnesses, fixing on the highest, lowest or medium rate, at your discretion. We think the rule applicable to stocks a correct one in cases of this kind, by keeping within range of the market on the day of delivery, to fix on the higher, lower or medium value, as the breach of the contract may have been wilful or innocent in your opinion."

In case of Watts vs. Mitchel, 1 Dulop, Bell & Murray Session cases, 1,157, the learned Judge, Lord Medwin, said :

" In estimating damages we are entitled to look at the use the one party intended to make of it and which the other might presume was intended. * And if the article were purchased by a dealer in it, with a view to be resold for a profit, and this was in the contemplation of the parties, I am unable to see how that can be laid out of view in estimating the loss sustained by non-delivery. * In the present case it must be held that the defendants could have given delivery, and that they only put it out of their power wilfully and wrongfully, and * this higher price is now in their pocket, which would most probably have been the profit on the sale of the article by the purchaser. * I think that this affords the true estimate of damages. * I see no better principle than this, in such a case, that the profit which the one would have made, the other probably has made; and justice requires that the one should not suffer, nor the other benefit by his own wrong."

In the case of Townsend vs. Jemison, 7 Howard, (U. S. Sup. Ct.) 722, it is decided that where there are several counts in a declaration, some bad and the others good, that notwithstanding a verdict and judgment on all, the latter must not in such case be reversed; the ground of the decision being that the United States Courts must be governed by the rules of practice in the State where the cause is tried, and that by express statute of Mississippi one good count, although the others are bad, will sustain a judgment.

In and by an express provision of the State of Illinois (where the case at bar was tried): " Whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed if any one or

more of the counts be good;" and in Anderson vs. Semple, this is decided to be the rule of practice in this State (2 Gilm., 455).

In the case of Wallrum vs. Babbitt, 16 Wallace 577, His Honor, Judge Davis, in delivering the opinion of the court, and having under consideration the instructions given in that case, says:

"In some respects, they may be technically inaccurate, and in others they were far too favorable to the defendants. But in any event they did not materially effect the merits of the action, and as there were no disputed facts bearing on the real matter in controversy, the court could have properly told the jury to find as they did for the plaintiffs. *Indeed the verdict was so obviously right that the court would not set aside the judgment when the record shows that no other result could be obtained on a new trial.*"

It is also the well settled law of Illinois that "a cause will never be reversed where substantial justice has been done, although error may be found in the record," as will fully appear by reference to the authorities cited in brief of defendants in error, ante, p. 37.

In Evans vs. Merriwether, 3 Scam., 492, it is said: "Where * justice upon the whole has been done, the Supreme Court ought not to remand a cause to see if a jury upon another trial would not give less, even if the true principles which govern the case were not correctly given to the jury;" and in McConnel vs. Kibbe, 33 Ill., 177, it is said: "Although the court below may have erred in some of its instructions to the jury, yet a new trial will not be granted, if, upon the whole record, it is apparent that on a re-trial the verdict must be the same.'

Further authorities on this point are indeed unnecessary. Plaintiffs' second and third additional counts are undoubtedly good and they alone would support the judgment. And upon the law of the case, the evidence *more* than justified the verdict. Measure the damages by the *highest* market values proven at New Orleans, and plaintiffs become entitled to $389,200—measure them by the *lowest* prices proven at New Orleans, and plaintiffs ought to have $305,730—measure them by the fair average market prices at Memphis *and* New Orleans, and the jury would have found $292,602—measure them by

the fair average market prices at Memphis alone and the result is $237,750—measure them by even an average of all the *minimum* prices as proven by all the witnesses and the verdict would still exceed $200,000—all this too, exclusive of towboat detentions, which, according to the evidence of Pratt, would figure up an additional sum of $6,900. That plaintiffs could have sold at least half of this coal in New Orleans at ruling rates, and the other half at Memphis hardly admits of question.

Profit on 15,000 at very lowest				New Orleans	prices	.....$	152,865
do	do	do	do	Memphis	do	.....	81,000
Makes plaintiffs' verdict						.....	$233,865

In short, no fair or reasonable estimate can be made wherein plaintiff's damages will not exceed the amount of the verdict. The breaches complained of were premeditated, willful and deliberate; and if any case ever justified court or jury in taking the highest prices proven, that case is now presented in the record before your Honors. In and by that record "the true merits" of plaintiffs' cause and its justice are made manifest. In and by that record plaintiffs' honesty of purpose, integrity and patient submission to wrong are established, and vindicated from every suspicion and reflection attempted to be intimated or expressed by opposing counsel. In and by that record the breach of faith, double-dealing and willful, premeditated wrongs of defendant are too glaringly revealed to be lost sight of in the ingenious theories of its able and distinguished attorney. In and by that record it stands admitted (ante. p. 15) that the plaintiffs (whom pefendant *wished* to "place in the wrong") never *were* "in the wrong;" and that the non-payment of "September penalties" and "boat yard bills" were mere pretexts, and defendant's *only* pre-

texts, for avoiding the contract—unjust exactions which plaintiffs were under no obligations to pay, but which they did pay and offer to pay in order to avoid even defendant's *pretexts*---paid the former November 1, and still got no coal—offered to pay the latter, but defendant refused even to discuss the matter, because its payment would remove the last vestage of a pretext. In and by that record it also stands admitted (ante. p. 16) that defendant has not and never had any defense to plaintiffs' cause of action, but is only resisting their just demands, so that, in the language of its president, "Phillips and St. John will have to encounter a large expense of time and trouble before they get them." And, finally, in and by that record, it is shown, beyond per adventure, that, whether there be or be *not* error, "SUBSTANTIAL JUSTICE HAS ONLY BEEN DONE TO THE PLAINTIFFS."

In conclusion, I respectfully and earnestly submit that "upon a review of all the errors assigned it will be found that the company is" *not* "well entitled to its prayer for a reversal of the judgment and verdict rendered in the circuit court;" but on the contrary, not one of the supposed errors assigned can be successfully established, or, if established, be held sufficient to reverse this case, in which the judgment below is so *obviously right* and so *substantially just*. As was well said, in Townsend vs. Jemison: "It is the office of the court to judge the law upon the whole record. There is nothing in the record entitling Defendant to any peculiar favors, and every reasonable intendment should be in favor of the judgment—Plaintiff in Error must make out his case clearly."

WM. B. GILBERT,
Of Counsel for Defendants in Error.

CAIRO, ILL., April, 1874.

Supreme Court of the United States.

THE GRAND TOWER MINING, MANUFACTURING AND TRANSPORTATION COMPANY, PLAINTIFFS IN ERROR.

vs.

WALTER M. PHILLIPS AND DAVID T. ST. JOHN, PARTNERS AS PHILLIPS & ST. JOHN, DEFENDANTS IN ERROR.

Brief and Argument on behalf of Defendants in Error by Hay, Greene & Littler, and Green & Gilbert, of counsel.

This is an action of covenant, brought by the defendants in error, on a contract under seal, in the circuit court of the United States for the Southern District of Illinois.

The instrument on which the action is founded was executed on the 15th day of December, A. D. 1869, and is set forth in the plaintiff's declaration on pages 11 to 22 of the record, both inclusive. It is also copied into the abstract filed by plaintiff in error, on pages 2, 3, 4, 5 and 6 of the abstract and brief prepared by its counsel.

We assume, therefore, that it will not be necessary for us to multiply papers by repeating it.

The serious controversy in the cause arises under the 9th section of the contract, found on pages 18, 19 and 20 of the record.

Under the first section of the contract the plaintiff in error agreed to sell and deliver to defendants in error "at Grand Tower on the Mississippt river, free, on board barges or other vessels, to be by them provided as hereinafter set forth, one hundred and fifty thousand tons of screened merchantable 'lump' and 'nut' coal, of the product of its mines in Jackson county, Illinois, yearly, during each of the years 1870, 1871 and 1872, in equal daily proportions, as near as may be, between the fifteenth day of February and the 15th day of December in each of said years." (Record, page 12.)

The defendants in error based their suit upon the alleged failure and refusal of the plaintiff in error to comply with said contract as to the quotas of coal which should have been delivered during the months of October and November, A. D. 1870.

The declaration as originally filed is found on pages 3 to 28 of the record, both inclusive.

Under leave of the court below, additional counts were afterward filed, which are set out on pages 41 to 58 inclusive.

From the commencement of the suit up to this time, plaintiff in error has set up every conceivable kind of objection, repeated in every imaginable form. We will try to consider each of these objections *once*, and thereby to dispose of it in all its forms.

Plaintiff in error demurred to each count of the declaration, and that demurrer was overruled. Instead of abid-

ing by the demurrers, the plaintiff in error plead to the entire declaration, and all its pleas but one, were held bad. By excepting to the instructions given by the court, and by asking for other instructions which the court refused, plaintiff in error again presents the same points which it raised on demurrer to the declaration, and by the pleas which were held bad. We might, with propriety, insist that having pleaded to the declaration, the plaintiff in error waived its demurrer thereto, and could not raise the same questions by carrying plaintiff's demurrer to the pleas back to the declaration.

But we do not know of any stage of the proceedings wherein the main controversy can so well be entered upon as that wherein the true merits of the plaintiff's cause of action are set forth by way of pleading.

Defendants in error withdrew the first count of the amended declaration (record, p. 28.) (We shall hereafter in speaking of the parties, designate them as they were designated in the court below as this is much more convenient and less liable to cause mistakes than the use of the words plaintiffs in error and defendants in error.)

The plaintiffs, as we have said, sued for damages for the non-delivery of coal under the contract, which coal should have been delivered in October and November, 1870. In some counts of the declaration, liquidated damages were claimed, and in other counts actual damages. Whether the recovery should be limited to twenty-five cents for each ton of coal with respect to which the defendant made default during the time specified, or whether the plaintiffs should be permitted to show the real extent of their injury under the general rules of law by which damages are measured, is the first and most important question in the case.

We propose to maintain that plaintiffs were not limited to liquidated damages; that the court below did right in permitting actual damages to be proven; and the jury did right in allowing actual damages under the instructions of the court.

PROPOSITION NO. 1.

That under the contract, the plaintiffs were entitled to recover actual damages.

The ninth section of the contract contains the following words.

"It is further mutually covenanted and agreed, that if for any other than the unavoidable causes hereinbefore mentioned, and through no fault of the parties of the second part, the party of the first part shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay to the parties of the second part, as liquidated damages, twenty-five cents for each and every ton which it may have so failed to deliver, or instead thereof the parties of the second part may elect to receive all or any part of the coal so in default, in the next succeeding month, in which case the quota which the party of the first would otherwise have been bound to deliver under this contract, shall be increased in such succeeding month to the extent of the quantity in default." (Record, page 18.)

It was strenuously contended below, and it is now insisted, that under the above stipulations the plaintiffs should have been confined in their recovery to twenty-five cents

for each ton of coal, with respect to which default was made in October and November, 1870. It is when the parties to a contract stipulate as to w be the measure of damages for the breach of it, are bound by such stipulation and will enforce it. It may be that many authorities will be produced in support of this general proposition.

We do not propose to discuss the abstract question, and have no desire to dispute the rule thus contended for.

We simply maintain that the rule referred to has no application here. It is true the plaintiffs were *entitled* to claim and recover twenty-five cents liquidated damages for each ton of coal with respect to which defendants made default; but it is equally true, that by the very terms of the contract it was provided that plaintiffs might elect not to take the twenty-five cents per ton, but to take the coal itself at a later period.

We fully agree that it is the duty of all courts in construing contracts to ascertain the intention of the parties and to carry out that intention. And it is also a rule of construction, that in all cases of doubt, the courts will interpret the words of the parties in the manner most consistent with reason. Applying this principle to the question now being considered, what do we find? If the interpretation contended for by the learned counsel on the other side be the true one, then it follows that the right of election expressly reserved in the contract means nothing whatever. The learned counsel tells us in substance, that we had a right under the agreement to *elect* to take the quota of coal for October in November, and the quota for November in December; but if the defendant thought proper to refuse so to deliver the quotas in question, then we could only recover the "liquidated damages." That is, we could only recover just what we had elected *not* to

We propose to maintain that plaintiffs were not limited to liquidated damages; that the court below did right in permitting actual damages to be proven; and the jury did right in allowing actual damages under the instructions of the court.

PROPOSITION NO. 1.

That under the contract, the plaintiffs were entitled to recover actual damages.

The ninth section of the contract contains the following words.

"It is further mutually covenanted and agreed, that if for any other than the unavoidable causes hereinbefore mentioned, and through no fault of the parties of the second part, the party of the first part shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay to the parties of the second part, as liquidated damages, twenty-five cents for each and every ton which it may have so failed to deliver, or instead thereof the parties of the second part may elect to receive all or any part of the coal so in default, in the next succeeding month, in which case the quota which the party of the first would otherwise have been bound to deliver under this contract, shall be increased in such succeeding month to the extent of the quantity in default." (Record, page 18.)

It was strenuously contended below, and it is now insisted, that under the above stipulations the plaintiffs should have been confined in their recovery to twenty-five cents

for each ton of coal, with respect to which default was made in October and November, 1870. It is said, that when the parties to a contract stipulate as to what ~~should~~ shall be the measure of damages for the breach of it, the courts are bound by such stipulation and will enforce it. It may be that many authorities will be produced in support of this general proposition.

We do not propose to discuss the abstract question, and have no desire to dispute the rule thus contended for.

We simply maintain that the rule referred to has no application here. It is true the plaintiffs were *entitled* to claim and recover twenty-five cents liquidated damages for each ton of coal with respect to which defendants made default; but it is equally true, that by the very terms of the contract it was provided that plaintiffs might elect not to take the twenty-five cents per ton, but to take the coal itself at a later period.

We fully agree that it is the duty of all courts in construing contracts to ascertain the intention of the parties and to carry out that intention. And it is also a rule of construction, that in all cases of doubt, the courts will interpret the words of the parties in the manner most consistent with reason. Applying this principle to the question now being considered, what do we find? If the interpretation contended for by the learned counsel on the other side be the true one, then it follows that the right of election expressly reserved in the contract means nothing whatever. The learned counsel tells us in substance, that we had a right under the agreement to *elect* to take the quota of coal for October in November, and the quota for November in December; but if the defendant thought proper to refuse so to deliver the quotas in question, then we could only recover the "liquidated damages." That is, we could only recover just what we had elected *not* to

accept. We bargained for the right of election between the liquidated damages and the coal; but we are now coolly told that while we might amuse ourselves by "electing," the defendant was at perfect liberty to refuse to carry a single quota of coal forward from one month to another, and by so doing to compel us to take the liquidated damages or nothing. The breach of the right of election, it seems, involved no consequences whatever to the defendant. The clause of the contract in which that right is reserved has not a shadow of legal meaning. We stipulated for the privilege of refusing to accept twenty-five cents per ton as compensation for the default of defendant; but defendant at the same time guarded itself against any other measure of liability.

Surely such propositions cannot be regarded as sound in law or reason; yet they are the very propositions on which the defense mainly rests.

In arguing this question, one of defendant's counsel insists on comparing the consequences which would arise to the plaintiffs in case of breach on their part, with the consequences which we seek to impose on defendant because of its breach. And because the penalty which the law might impose on the plaintiff under the contract for any breach would be lighter than that which we seek to impose on the defendant, our theory as to the rights of the parties must be erroneous. Now we submit that the position thus assumed by the learned counsel is essentially false in two particulars: It does not appear that the contract imposes more disastrous consequences upon one party than upon the other, in case of a default; and if this did appear, it would not afford any reason for assuming that such result was unintentional with the parties; nor would the contract be less valid because the parties measured the liabilities of each other by different standards.

Our construction does not render the contract "unilateral," as the learned counsel contends. (Mr. Allen's abstract and argument, pages 48, 49, 50 and 51.) It is very true that if the plaintiffs should fail to accept any monthly quota of coal, or should prevent the defendant from delivering it, the damages which the plaintiffs would be required to pay could only extend to twenty-five cents for each ton *less than one-half the monthly quota so refused.* This is the express provision of the ninth section of the contract. The plaintiffs would be entitled to recover twenty-five cents for every ton which the defendant failed to deliver, and might, as we insist, claim actual damages; yet the defendant would only be entitled to recover twenty-five cents per ton for each ton less than one-half the monthly quota which the plaintiffs failed to receive. But it does not at all follow that the contract is one-sided. In case of default by the defendant the plaintiffs would be and were compelled to pay rent upon, and bear all the expenses of keeping in readiness their enormous fleets of barges and tow-boats, and would have nothing, and had nothing whatever on hand wherewith to maintain their trade or keep up their markets. Had the plaintiffs made default the defendant would have occupied a very different position. Defendant would have its penalty, its rent on the barges, *and the coal itself.* A penalty of twenty-five cents per ton on all quantities which the plaintiffs refused to accept, less than one-half a monthly quota, might well be considered complete indemnity to the defendant while retaining the very commodity for the non-acceptance of which the penalty was paid.

We take it for granted, that in framing the agreement the parties fully considered the consequences that would be likely to arise to them respectively, by reason of any breach.

The learned counsel on the other side tell the court that the agreement was drawn with extreme care, and that the parties are not entitled to that liberality of construction which is sometimes given to instruments hastily prepared by unskillful men. This we fully concede. And we conceive it furnishes a very strong reason for presuming that the parties fully contemplated the consequences of their own stipulations. They knew the extent of loss which they might suffer by reason of a breach on either side. If they provided a more extreme penalty for default on one side than on the other, they did so in the full belief that the consequences of such default would be more disastrous to one party than to the other.

Thus we find that in the ninth section it is stipulated, that if the defendant should fail to deliver a monthly quota of coal, the plaintiffs would be entitled to certain damages specified. But it is further provided that the plaintiffs might elect not to take the damages so fixed, and might elect in lieu thereof, to take the coal itself in the next succeeding month. So much for the remedy of the plaintiffs. In the very same section a remedy is provided for the defendant against any default by the plaintiffs. The rate is fixed and the quantity to which such penalty should apply. But not a word is said as to any right of election. Why is this? Because the defendant did not consider such right of election necessary to its own indemnity. There was no oversight in the omission. It cannot for a moment be contended that the parties forgot to insert a provision in favor of the defendant which they had inserted in favor of the plaintiffs. They inserted it in one case and omitted it in the other, because it was considered necessary to the complete indemnity of one party and not to that of the other. We can scarcely understand the reasoning of the learned counsel on the other side, when he insists that the court ought not to give effect to the right of

election on behalf of the plaintiffs, because no such right is secured to the defendant. We see no force in the objection that the contract is "unilateral." Does the learned counsel mean that the parties did not know what they were signing? No; for he says the contract was drawn with great care. Why, therefore, does he insist that to permit the plaintiffs, to recover actual damages would be to give the contract a one-sided interpretation for the reason that the defendant could only recover liquidated damages? To this we reply, the plaintiffs for their own protection, inserted a provision in the contract reserving to themselves the right *not* to take liquidated damages; that the defendant deliberately accepted this stipulation as a substantial element of the agreement; that the defendant did not insert, nor did the plaintiffs agree to any such provision with respect to the remedy of the defendant. Each party bargained for such rights as were supposed to be sufficient for its purposes.

If it be important to enquire into the design of the parties, as the counsel on the other side seems to think, the reason why the plaintiffs stipulated for a right of election is very plain. They knew that during a great part of the period covered by the contract, they would probably lose money in carrying it out.

This was the fact, as is shown by the letter of George Talbot Oliphant, president of the defendant's company, dated Sept. 10, 1870. (Record 132.) They relied for their profits upon the scarcity of coal which always exists on the Mississippi river when, by reason of ice or low water, the Ohio is closed to navigation. (Record, pages 155 and 166.) They were well aware that a time would probably come, when it would be more profitable to the defendant to break the contract than to perform it. If, after losing largely on all coal received during periods of

low prices, they should be compelled to accept twenty-five cents per ton instead of market rates for all coal which defendant might withhold during periods of high prices, they could not but regard themselves as being at the mercy of the other contracting party. In the estimates they made of the prospects and profits of the business, they considered twenty-five cents per ton as the lowest measure of damages by which they could be compensated for the mere expense of maintaining their fleets and coal yards under any circumstances, and it was very apparent that much higher damages would be required to cover their loss if deprived of the advantages of a high market. In view of these considerations they expressly stipulated for the right of taking liquidated damages if they should so elect, or of rejecting such damages and calling for the coal itself if their interest would be best subserved thereby.

We make these statements as to the intentions of the plaintiffs, not by way of giving information outside the record, but because we have a right to do so from the very provisions of the contract itself.

In fact the whole theory of the defendant as to the legal effect of the right of election bargained for by plaintiffs, when closely examined degenerates into absurdity. Under that theory the plaintiffs only acquired a right to make a *request* that the undelivered quota of one month should be delivered in the next. They might ask this as a *favor*, but not demand it as a right. We assume that no written stipulation was necessary to entitle plaintiffs to prefer a petition. Parties may do this under any contract. We do no injustice to defendant in thus describing its poposition on this point. The learned counsel representing defendant have always maintained, and still maintain, that 25 cents per ton must be taken as the measure of damages for the non-delivery of coal under any and all circum-

stances. That whether the plaintiffs "elected," or "requested" or "demanded" the undelivered quota of one month to be delivered in the next, the defendant had only to refuse to comply and nothing remained to the plaintiffs but the liquidated damages already refused, or nothing. We are really curious to know what became of the right of election under this theory, and what it meant in the contract. One reason which the learned counsel assign for their construction of this part of the agreement, is founded on certain language used in section nine with reference to such quotas of coal as might be carried forward from one month to another, under the exercise by plaintiffs of the right of election. In such case it is said the quota which the party of the first part would otherwise have been bound to deliver under this contract, "shall be increased in the succeeding month to the extent of the quantity in default."

It is insisted that because a monthly quota thus transferred is to become part of the quota of the month into which it is carried, it therefore loses its distinctive character, and cannot be separated from the quantity into which it is merged, for any legal purpose. We are told that a quota thus merged cannot be separated so as to form a basis for the recovery of actual damages, while the quantity to which it is added may furnish the basis for liquidated damages only. That the quota for a month means the quantity proper to that month, with all former undelivered quotas added thereto, and however large the aggregate may be, the plaintiffs have but one remedy, *i. e.*, to take the liquidated damages. True, they may announce their election to take coal in the next succeeding month, but if compliance shall be refused, they must content themselves with again "*electing.*"

And even if this farce were repeated during the entire three years, plaintiffs would be left at last to take the liquidated damages so often refused, or nothing. Twenty-five cents per ton, we are told, is the measure of damages fixed by the parties which the court must enforce, and if so, no other measure can be applied during the continuance of the contract or at the expiration of it.

It would be indeed strange if the words incidentally used in the contract, declaring that under the right of election therein provided for, a quota of coal transferred from one month to another should increase the quota of the latter month, must be so construed as to destroy the right of election itself. Yet this is precisely what is contended. Counsel for defendant insists that a transferred quota at once becomes subject to all the legal incidents attaching to the quota to which it is added. And it is one of those incidents that the plaintiff must either take the 25 cents per ton for non-delivery, or elect to carry the quota forward, so the liquidated damages must either be accepted or the whole quantity in default must be carried forward together.

Under this construction the plaintiffs merely *elect* not to take the coal, but to carry forward the privilege of *electing*. And at the end of the chapter they must content themselves with what they reserved the right to *reject* and *did* reject from the begining.

There might be more plausibility in this theory if it were admitted that after rolling forward from month to month, actual damages might be received at last. But even this the learned counsel deny. It is very certain however, that the parties never contemplated the repeated transfer of the same undelivered quotas from month to month. Recurring to that "reasonable interpretation" which

is insisted upon, it is very apparent that neither the plaintiffs nor the defendant ever supposed it to be within the range of legal obligation or possibility, that the latter might continuously refuse to deliver coal at the proper periods, and thus compel the former to accept liquidated damages, or in lieu thereof hold themselves in readiness at all times to accept all accumulated quotas whenever tendered. Under the contract the plaintiffs were required to have "moored along side the river bank at Grand Tower, barges, or other suitable vessels, sufficient to receive in equal daily proportions, the coal aforesaid."

If the repeated transfer of the same quotas from month to month was all that plaintiffs could demand under the right of election, then they were required to multiply their vessels in the same ratio as the quotas increased. If the quantity undelivered, however large, became the quota for each current month, the plaintiffs must have been ready to receive it. The furnishing of barges was a condition precedent to the duty of defendant. The evidence shows that some barges had a capacity of 700 tons, but the majority had only a capacity of 450 tons. Under the construction of the contract contended for by the learned counsel on the other side, it was entirely competent for the defendant to compel the plaintiffs either to accept the twenty-five cents per ton, or be prepared to accept the whole quantity due at any time.

At the end of three years the aggregate would amount to 450,000 tons, and would probably require for its transportation a greater number of barges than could be found on the whole Mississippi river and all it tributaries. And at last the plaintiffs could take nothing but liquidated damages.

We are aware that the supposition we make is an extreme one, but it is a fair statement of defendant's theory.

We say that the plaintiffs are not limited by the liquidated damages mentioned in the contract for the simple reason that it was a part of the contract that they should not be so bound. The provision with respect to 25 cents per ton was inserted in the contract for their benefit; that they should not be compelled to accept *less* in any event. They bargained for the right of rejecting this compensation if it should not prove adequate, and of transferring any quota undelivered in one month, to the next. And having exercised their right of election in each instance, and the coal still remaining undelivered, they claim actual damages with respect thereto. The contract being silent as to any measure of damages to be applied in such instance, the parties are remitted to the standards of measurement fixed by the general rules of law.

We cannot do better than to quote the words of Mr. Justice Davis of this court, in construing the contract in the court below.

"It is our duty to construe all agreements according to the intention of the parties, and in our view, the intention of the parties in this case is very apparent. By the terms of the contract it was the duty of the defendant to deliver a particular quota of coal to the plaintiffs during each month, but if the defendant failed to deliver the quota required in any month, then the plaintiffs acquired the right to take the sum of twenty-five cents for each ton so undelivered, or if they preferred, they might elect to take the amount of coal so deficient, in the next succeeding month. In the latter event, if the amount so carried from one month to the succeeding month, was not delivered in such second month, then the plaintiffs were not compelled to accept the sum named as liquidated damages, but might sue for actual damages. This must be so or the

plaintiffs would be compelled to wait until the expiration of the entire three years specified in the agreement, before sueing for a breach of the covenant.

Not only this, but if the quotas of coal for so many months were required to be rolled forward from month to month for such a length of time, it would be impossible for any party to furnish transportation for such a quantity.

We cannot believe that such was the intention of the parties, and we therefore so construe the covenant of defendant as that the plaintiffs acquired a right of action for the recovery of actual damages as soon as the defendant failed to deliver during a second month, any quota of coal carried over by election from a preceding month."

This disposes of the first error assigned and of all the exceptions taken to the rulings of the court below, so far as the construction of the contract is concerned.

The second assignment of error questions the ruling of the court below in sustaining the plaintiff's demurrer to the defendant's 4th plea.

The substance of that plea may be stated briefly: It alleges that by a subsequent contract between the parties, neither shall be excused for any failure, neglect or departure from the terms of the original agreement, after the first day of April, 1870. That by said original contract plaintiffs were bound to accept from defendant a large quantity, to-wit: 15,000 tons of coal in each of the months of July, August and September, A. D. 1870, or to pay the defendant for not accepting, twenty-five cents for each ton less than one-half of the quotas of said months, which defendant should be prevented from delivering by the default of plaintiffs. That, without any fault of defendant,

the plaintiffs did prevent the delivery of 12,099 tons in the month of July, 10,370 tons in the month of August, and 13,979 tons in the month of September, 1870. That during the months of October and November of said years the plaintiffs were indebted to the defendants in the sum of $6,000, for liquidated damages due and owing by reason of plaintiffs' fault in preventing the delivery of coal as aforesaid, and by reason of said indebtedness, the defendant was not bound to deliver coal to the plaintiffs during the months of October and November, 1870. Such is the substance of the plea which the court held bad. The defendant says to the plaintiffs in effect. "You failed to accept coal in July, August and September, and were indebted for the penalties thus incurred during October and November, therefore we are released from delivering to you any coal during the last two mentioned months."

It will be observed that the facts set up in the plea are not stated for the purpose of claiming any benefit by way of set-off or recoupment. The plea is that the defendant was *released* by the failure of the plaintiffs at a former time, to accept coal and to pay the penalties for such refusal.

The value of the plea can be best understood by examining the provisions of the contract bearing thereon. The ninth section, after fixing the damages which the plaintiffs should be required to pay for any failure to receive coal under the contract, proceeds as follows:

"And it is further mutually covenanted and agreed that if the parties of the second part shall in any month fail to make payment for coal received, and the use of barges or other property leased from the party of the first part, sold, worn out or destroyed, or fail to pay maturing obligations as provided herein, the party of the first part shall be re-

leased from any obligation to make further deliveries of coal. And it is further materially covenanted and agreed that if either of the parties hereto, shall, for the period of two consecutive months, neglect to perform its engagements as herein set forth, the party not in default shall have the right to declare this contract null and void, and shall thereafter be released from all further obligations in the premises."

The first clause of the the above paragraph, if taken alone, might, by a strained construction, be held to so operate as to release the defendant from the delivery of coal, on the happening of either of three contingencies, namely: the failure of the plaintiffs to pay for coal already delivered; or to pay for the use of barges sold, worn out or destroyed; or to meet "maturing obligations." The clause of section nine first above quoted, enumerates the several defaults on the part of the plaintiffs, either of which would so operate as to release the defendant from any further delivery of coal. But the failure to receive coal is not one of these specified defaults. "Maturing obligations," as used in said first clause evidently means those obligations contemplated in section five of the contract, wherein payment for coal and rent of barges is required to be made in cash or four months' paper. A failure to pay liquidated damages for not accepting coal would be a default clearly within the concluding provision of section nine, as quoted above. But the legal effect of such default would be very different from the effect sought to be given to it in the plea.

The failure of the plaintiffs to perform any obligation on their part would not terminate the contract, except at the option of the defendant, unless the defendant chose to take advantage of such failure, and to abandon the agreement, for that reason, the plaintiffs would be required to

proceed or bear the consequences. And the defendant, not choosing to avail itself of the right of abandonment, but electing to treat the agreement as still in force, would be required to continue performance on its own part. The concluding words of section nine indicate clearly the nature of the remedy accruing to the defendant in case the plaintiffs made such default as that set up in the plea: "the party not in default shall have the right to declare the contract null and void." The defendant had the right to abandon the contract or continue it in force. In the latter event the plaintiffs would be held liable for unpaid liquidated damages, and required to go on and perform the remainder of the contract, but the defendant must have done the same. In the former event, the defendant was required to exercise this option and *declare* the contract at an end. It could not treat the agreement as being in force for all the purposes of future performance by the plaintiffs, but as being void as to future performance on its own part.

Now the plea does not aver that the defendant *declared* the contract void, or so notified the plaintiffs for any reason whatever. The law itself will not work a forfeiture of contract when the party who might declare such forfeiture fails to do so. The plea is, therefore, fatally bad in this respect. It involves an attempt to make the *law* put an end to the agreement, because of the alleged default of the plaintiffs; while the defendant herself, having the right to declare the contract void, was wholly silent with respect thereto.

In passing on this plea in the court below, Mr. Justice Davis said:

"Counsel for the defense insists that under the two last covenants in section 9 of the contract, he has a right to interpose the defence that the contract is at an end. The last clause of the 9th section reads:

"And it is further mutually covenanted and agreed that if either of the parties hereto, shall, for two consecutive months, neglect to perform its engagements as herein set forth, the party not in default shall have the right to declare the contract null and void, and shall thereafter be released from all further obligations in the premises."

There is no question that the defendant had a right to put an end to the contract if the plaintiffs for two consecutive months, refused to receive the coal that had been taken out by the company, but the defendant did not choose to do that, and *did not* put an end to the contract.

It should be averred further, that they did declare the contract void if they could show that the plaintiffs refused to receive the coal. But it does not appear that anything of the kind was done, because the parties went on under the contract. The covenant preceding the one quoted does not refer to that subject: it says: "And it is farther mutually covenanted and agreed that if the parties of the second part shall, in any month, fail to make payment for coal received, and the use of barges and other property leased from the party of the first part, sold, worn out or destroyed, or fail to pay maturing obligations as provided for herein, the party of the first part shall be released from any obligation to make further deliveries of coal."

This refers to the covenant in the lease to pay for the use of the property leased by defendant to plaintiffs, and to pay he time paper, which the plaintiffs had the privilege of giving, in place of cash for coal received.

This opinion of Mr. Justice Davis fully answers the defense attempted to be set up in the fourth plea, and all similar pleas, including those interposed to the additional counts of the declaration. It would be strange, indeed, if the law would permit the defendant to suffer the plaintiffs

to go on with the contract, to keep their steamers and barges for months waiting for coal, to pay rent for such steamers and barges, to make their election to have the October quota carried into November, and the November quota carried into December, and then escape from all liability—for a gross and wanton violation of its covenant, solely on the ground that the plaintiffs had, on some former occasion, made such default as would have entitled the defendant to declare the contract at an end, had it so elected.

The facts set up in the plea are of course admitted by the demurrer so far as they are well pleaded. But the admission is limited to the discussion and purposes of the demurrer. We will show hereafter that these statements are false in fact, and that in setting them up in the plea the defendant pursued that course of bad faith, falsehood and outrage which marked its course from the beginning in its dealings with the plaintiffs.

POINT NO. 3.

The court below sustained demurrers to all the defendant's pleas except the first. (record p. 27). Counsel for defendant says on page 10 of their printed abstract and brief, that no question is made in this court as to the ruling of the court below in sustaining the demurrer to the 2d, 3d and 5th pleas to the original declaration. They also say on page 14 that they make no question as to the ruling of the court below in sustaining demurrers to all their pleas to the amended declaration. So that no controversy arises as to any of the pleas except the first and

the fourth. The latter plea we have already discussed. The former was held good in the court below, and it was upon the issue raised thereby that a trial was had.

The first plea is indeed nothing but a traverse of a material fact averred in each count of the declaration. Being very short we give it entire:

"And the said defendant by Thomas G. Allen, its attorney, comes and defends the wrong and injury, when, etc., and says that the plaintiffs at the time when, etc., did not furnish and deliver to the defendant, barges, moored in good order alongside the river bank at Grand Tower, suitable and sufficient to receive in equal daily proportions the said quotas of coal, as said plaintiffs in their declaration have alleged. And of this the defendant puts itself upon the country, etc." (Record p. 11.)

The issue of fact thus raised involved the single question whether the plaintiffs had barges to receive the coal at the proper time. Whatever the truth may have been as to the readiness of the plaintiffs to receive the coal, one thing is certain, the defendant was fully resolved not to deliver any.

Mr. St. John testifies that on the 31st day of October, 1870, he went to Mr. Oliphant, president of the defendant's company, and enquired why he could not get the coal. Mr. Oliphant replied "he had told Mr. Phillips because we had not paid our boat yard bills; that he replied to Mr. Oliphant, that, that was outside the contract, but could be arranged. Mr. Oliphant said "we must pay them." I said, "if we pay will you give us the coal?" He said, "pay, and then we will discuss that. You will know when your barges are loaded whether you will get coal or not." This was on the 31st of October. Mr. St. John

further testifies: Next day I said, "we can't pay our boat yard bills if you don't give our claims consideration. He said he would not discuss that question. I asked him if he was aware that our business had stopped. (Record p. 31.)

In the same conversation Mr. St. John gave Mr. Oliphant a written notice that the plaintiffs would take the October quota in November. Mr. Oliphant threw the paper down, and said he would read it "when he felt like it." (Record 32.)

Mr. Oliphant did not claim or pretend there was any want of barges, or that his own refusal to deliver the coal had anything whatever to do with any question of transportation. He did claim that there was a penalty due from plaintiffs for September. This could only refer to a penalty due or claimed to be due from plaintiffs for not accepting coal in September. Mr. St. John testifies that he paid this penalty under protest in November. (Record 34.)

On the 10th day of October Mr. Phillips saw Mr. Oliphant at Grand Tower, and asked why the coal was not delivered. Mr. O. would not discuss the question. He knew the barges were there, and made no objection as to their sufficiency, but politely stated that when plaintiffs barges were loaded "they would know whether they were to have coal or not." (Record p. 35.)

On the 10th day of September, 1870, long before the time when the first coal for which we now sue, was to have been delivered, Mr. Oliphant wrote to his superintendent at Grand Tower that he "felt more than ever anxious to put an end to the contract with Phillips and St. John." He states in that epistle that it is "important we should

if possible put them in the wrong before we take the decisive step. But we cannot afford to wait long." (Record 131 and 132.)

He directs his agent to "get all the money you can first. then get the river stock; and when that is accomplished throw them overboard and let them sue." (Record 133.)

P. D. Pratt testifies that he was agent for plaintiffs in transporting their coal; that on the 4th day of October, 1870, he demanded coal of Mr. Driggs, defendant's superintendent at Grand Tower, stating that they were anxious to get coal. Driggs said he could not give the plaintiffs any coal "that week." Pratt repeated the demand every day for some time, until at last he asked Driggs to accept the demand as being made every day without requiring him (Pratt) to make it in fact every day. Driggs said he would. Before that time Pratt had made the demand every day for two weeks, and Driggs knew that the barges were there. (Record p. 115.)

There is nothing anywhere in the record to question these statements. Mr. Driggs himself in his testimony does not pretend that he refused to deliver coal for the reason that there were not barges enough to receive it; nor does he claim that there was any want of barges whatever. On the contrary he shows that there were barges ready to receive the coal, and that the refusal to deliver had nothing whatever to do with that consideration. (Record, p. 149 & 150.)

We refer to all this testimony for the purpose of showing that the defense set up in the plea is a mere pretext. The defendant did not refuse to deliver the coal because the plaintiffs were not prepared to receive it, but because of a previous determination to break the contract

at all hazards. The defendant was resolved as Mr. Oliphant said, " to put Phillips and St. John in the wrong, if possible," but to break the agreement in any event.

And this determination becomes important in a legal point of view. It is insisted that the court below erred in admitting evidence tending to show the designs of the defendant with respect to a deliberate abandonment of all its duties under the contract. We insist that such evidence was eminently proper. It is a settled rule of law that while a party sueing for a breach of contract must show his own readiness and willingness to perform any concurrent or precedent condition on his own part, yet very slight evidence of such readiness and willingness will be sufficient when the evidence shows that the defendant in fact committed the breach complained of without regard to the performance or non-performance of such condition. In such case the plaintiff is only required to make formal proof of an act, which, as shown by the evidence, would have been wholly useless.

Hough vs. Rawson, 17 Ills., 588.
Hungate vs. Rankin, et. al., 20 Ills., 642,
Pahlman vs. Emily King, 47 Ills., 641.

But we are not driven in this case to the necesity of relying on slight proof as to the fact that the plaintiffs had barges moored alongside the river bank at Grand Tower, ready to receive the coal had it been tendered.

Captain Pratt, who was trying to get the coal for plaintiffs, testifies that on the 27th day of September plaintiffs had at Grand Tower three empty barges, and three more scarcely half full. That he left Grand Tower on that day and returned on the 4th day of October and found the barges as he left them. He tried to get coal but could not,

although Driggs, defendant's superintendent, did not refuse to deliver coal because of any want of barges. On the 14th of October they had five square barges with a capacity of 450 tons each, and two "monitors" with a capacity of 700 tons each, On the 27th he thinks three monitors and two additional square barges came up, making 16 or 17 at Grand Tower. During all this time he could get no coal. (Record, p. 115 & 116.) He further says that plaintiffs had other barges at Memphis, Cottonwood Point, and Cairo. Thinks there were 17 at Cairo. That ten of these barges could have been brought to Grand Tower in 24 hours; those at Cottonwood Point in 48 hours, and Phillips and St. John had two coal tow boats. (Record, page 46.)

Mr. St. John testifies that Grand Tower is 80 miles above Cairo. That from October to the middle of December, plaintiffs had in their possession, for receiving and transporting coal, 35 to 38 square barges, about 14 monitor barges, and quite a quantity of others. That they had two tow boats, the "Comet" and the "Grand Lake." That on the first day of October there was tonnage at Grand Tower sufficient for over 2000 tons of coal; there were 27 barges at Cairo, 14 at Memphis and at New Orleans 10 or 12. (Record, p. 95.)

J. W. Bukup, who superintended the loading of coal for plaintiffs, and who had the best possible means of knowing all about the barges, testifies that plaintiffs had 15 monitors and 35 square barges under their charge. That on the first day of October there were three partly loaded and three empty, at Grand Tower. That they had 27 barges at Cairo; of which 5 were brought to Grand Tower on the 6th of October, and on the 14th a further number. Refreshing his memory, witness states that there were five

square and two monitor barges brought up on the 7th of October, and all these barges remained at Grand Tower until the middle of March, and were in a condition to receive coal. That the capacity of the square barges was 460 tons, and that of the monitors from 700 to 750 tons. (Record, p. 123 & 124.)

Thus it appears that there never was a moment during the entire time, when the plaintiffs had not barges at Grand Tower sufficient to receive all the coal which defendant was required to deliver from day to day, with other barges at such an easy distance that they could have been produced whenever those already moored at the river bank should be loaded. The delivery of the requisite quantity to distribute the monthly quota of 150,000 tons into "equal daily proportions," would have been 500 tons per day. Had the defendant commenced to load on the first day of October, there was tonnage enough then at Grand Tower to have required from three to four days to fill. In a much shorter period there could or would have been an ample supply of other barges received from Cairo, had the plaintiffs' agents seen that such supply was likely to be needed. In fact the barges did continue to arrive notwithstanding the utter refusal of the defendant to deliver coal.

It is certain therefore that the plaintiffs fully kept and performed the condition precedent on their part, as to furnishing barges sufficient to receive the coal "in equal daily proportions" as the contract required, unless the objection stated in the 3d error assigned is well taken. On the trial below the defendant by its counsel, objected to the introduction of any evidence showing that the plaintiffs had barges elsewhere than at Grand Tower. The court overruled the objection and admitted the evidence. If we understand the position assumed by the learned counsel, it is

simply this: that although on the first day of October the plaintiffs had barges moored at Grand Tower sufficient to receive the daily proportions of coal for that day, and the next and the next after, and also had other barges ready to take the places of those at Grand Tower as soon as the latter were loaded, yet all this was not enough. The plaintiffs should have had a still larger number, it seems. How large a fleet we were required to have it is impossible for us to say. Whether we were required to line the banks of the river with barges enough to carry the daily, or the monthly, or the yearly quotas, we are not informed. But we are told that it was not a compliance with our part of the contract to have at Grand Tower on the 1st day of October, a three or four days supply, with full capacity to so use our fleet as to receive promptly every ton of coal which the defendant was required to deliver under the contract.

But we submit that had the defendant been eager to deliver the coal the performance by the plaintiffs was ample to have permitted such delivery. It was sufficient if they had a supply of barges ready for use at Grand Tower on the first day of October, and were fully prepared to keep up the supply. We say this would have been a complete performance of the precedent condition even had the defendant intended to keep its covenant. But when it is remembered that defendant refused even to fill the barges partially loaded on the last day of September, (record, 125) and did not deliver a pound of coal thereafter: that the presence of plaintiffs' fleet at Grand Tower not only might be, but actually was, wholly useless, the real merits of the defense set up in the plea will be understood.

If the averments of the plea were true they would not furnish any moral reason for discharging the defendant from liability, for the want of barges had nothing to do

with its default. But the evidence shows, and the jury properly found the plea to be false in fact, and therefore not good as a defense either in law or morals.

POINT NO. 4.

In the 3d error assigned it is objected that the court should not have permitted Mr. St. John to testify as to his conversations with Mr. Oliphant, president of the company. (Abstract p, 40.)

In the 4th error assigned it is objected that the court should not have permitted Mr. Phillips to be asked the question "whether or not the plaintiffs had been in business in New Orleans under a contract with the defendant." (Abstract p. 40.)

The 5th error assigned is based on the ruling of the court below in admitting as evidence the letter before referred to, written by Mr. Oliphant to Mr. Driggs. (Abstract 40.)

The 6th error assigned is based on the ruling of the court below permitting Driggs to answer the following question: "state whether you recollect that an application was made for a small quantity of coal to get the Grand Lake out of danger or to move her somewhere. (Abstract p, 41.)

The 8th error assigned questions the action of the court in permitting the plaintiffs counsel to ask witness Wilmont "whether the coal market on the Mississippi is subject to fluctuation owing to variations in the stages of the Ohio river. Also in permitting the witness to answer 'yes sir, very much so.'"

In the 9th error assigned it is objected that the court should not have permitted the same witness to be asked the following question: "Do business men make calculations with reference to these variations? Also that the court should not have permitted the witness to answer 'yes sir.'" (Record 155 and 156.)

The errors assigned as numbers 3, 4, 5, 6, 7, 8 and 9, may all be considered together, except one proposition contained in number 3, which we have already discussed. They all relate to certain evidence admitted by the court below against the objection of the defendant: and one of them questions the propriety of a remark made by the judge in the hearing of the jury. The ground of objection, stated by defendant's counsel at the time the evidence complained of was offered, was that of *irrelevancy.*

We think it may be safely assumed that the admission of irrelevant evidence can not be assigned as error, unless it appears that the party complaining either was or might have been in some way injured thereby. Even an irregularity amounting to absolute error will not justify a reversal if no harm is done.

Johnson vs Jones, 1st Black., U. S., S. C., 222.
Ramsey vs Jenkins, 9th Gill. p. 61.
Banning vs Banning, 12 Ohio (N. S.), 437.
Watson vs Campbell, 38 N. Y. 153.
Boynton vs Urian, 55 Penn. St., 142.
Darnell vs State, 27 Ind., 506.

This is particularly true as to the admission of irrelevant or immaterial evidence.

Holbrook vs Nichol & Prettyman, 36 Ill., 161.
Bauman vs Bowles, 51 Ills., 380.

The evidence complained of, tended to show that the defendant refused to deliver the coal. If this were all the effect of it, the defendant could not possibly be injured by its going to the jury. The plea admitted that the defendant had not delivered the coal or offered to deliver it. therefore at most, the evidence could only be regarded as irrelevant to the issue, because the fact which it tended to prove was already admitted. But we submit, that the conversations between Messrs. Phillips and St. John and Mr. Oliphant, about the very coal in controversy and the letters written by the latter to his superintendent, so far as they relate to this contract, tended to prove something more than the non-delivery of the coal. We have already seen that the plaintiffs had an ample fleet of barges at various points on the Mississippi river, with plenty of steam power to move their vessels.

They had some barges moored at Grand Tower on the first day of October, and others so situated that they could be brought up the river in from 24 to 36 hours. The degree of effort which the plaintiffs were bound to make to get those barges from below Grand Tower up to that point would of course depend on the purpose which the defendant might manifest either by the words of its officers, or by their actions. If it was clear that the coal would be delivered as the contract required, then the plaintiffs were bound to get up those barges at their peril; although we may remark that the provision in the contract which speaks of the coal being delivered "in equal daily proportions as near as may be" shows that neither party was to be considered as in default merely because of trifling failures. If, on the other hand, it was apparent that the defendant did not intend to deliver the coal, then a much less degree of preparation was required on the part of the plaintiffs. Had the defendant openly announced its pur-

pose not to deliver coal, but to abandon the contract in this respect, this would have relieved plaintiffs from the necessity of making any preparation whatever. But so long as the defendant merely neglected or evaded performance of its obligations the plaintiffs were justified in gauging their own measures by the movements of the defendant. It was enough it they kept their boats in such condition as that would be always available when the defendant required them.

And any evidence tending to show the design of the defendant with respect to the delivery of the coal, became important as also showing what the plaintiffs were required to do in order to keep pace with the defendant. Indeed the contract establishes a fixed relation between the duties of the parties with respect to delivery on one side, and readiness to receive on the other. And it is certainly enough for us to show that they kept far enough in advance of the defendant to leave it full scope for performance.

Therefore it was that the conversation between Mr. Phillips and Mr. Oliphant on the 11th day of October, and the conversation between Mr. St. John and Mr. Oliphant on the 31st day of October became relevant. The attitude of the defendant's superintendent towards plaintiffs was, of course, controlled by the instructions he received.

We find in the letter of September 10th an explicit declaration that the contract was to be broken off. (Record 132.)

On the 30th day of September, Mr. Oliphant wrote as follows: "Contract or no contract, they will get no more coal from us. The court may award damages, but Phillips and St. John will have to encounter a large expense

of time and trouble before they get them, and we had better pay the full amount every month rather than go on as at present." (Record 158.)

It is said that plaintiffs did not know of these letters at the time. But they did know that the agents of defendant were first postponing delivery for "a week," and afterwards refusing to deliver in to-to. (Record 115.) And plaintiffs had a perfect right to measure their own preparations in the light of the delays and refusal of the defendant.

There are some other considerations growing out of the 4th, 6th, 7th, 8th and 9th errors assigned, which we will present hereafter in connection with another branch of the case. The objections taken to the relevancy of the evidence referred to in those assignments of error, are, in our opinion, sufficiently answered by what we have already said with respect to the effect of errors by which no one was, or could be injured. We have also endeavored to show that the letters read in evidence and the conversations between the plaintiffs and Mr. Oliphant were both relevant and important.

Hereafter we will try to show that certain other evidence, objected to by the defendant on the same ground, was properly admitted as having a direct bearing on the issues.

In the 7th error assigned (abstract 41,) it appears that witness Driggs was asked to state "under what circumstances that correspondence from Mr, Oliphant was given, and about the difficulty with Phillips and St. John about the time these letters were written and previous to it?" The witness answered "can't tell." He was then asked "Do you know that Phillips and St. John had been bothering the company?"

The plaintiffs objected to this question, and the court sustained the objection, remarking that "the letters show the circumstances under which they were written sufficiently." (Record 148.)

The first question thus quoted was clearly improper for many reasons. It assumed that there was a "difficulty" between the parties, and proposed to enquire into it, without regard to the connection which such difficulty might or might not have with the matter in controversy. As we have already shown by the testimony of Mr. St. John, there was a dispute about boat yard bills which had nothing whatever to do with the coal or the contract sued upon. But whatever the fact might be, the witness could not answer the question. And besides this, relevant or irrelevant, it was neither objected to nor excluded. When the learned counsel complain that certain testimony offered by the defense was ruled out, it is well to understand what the fact was.

After the witness had answered the first question another was propounded. The witness was asked whether Phillips and St. John had not been "bothering the company."

If the plaintiffs had been guilty of any act by which their rights under the contract were destroyed; or if they owed the defendant a single dollar on any ground whatever, it was entirely competent for the learned counsel to plead and prove such facts either by way of release or set-off or recoupment. The defendant has in fact shown its entire willingness to grasp at any defense however unsound that could be suggested or imagined. But when in the absence of any plea or pretense of defense other than the false one that plaintiffs had no barges ready, it was sought to show that the plaintiffs had been "bothering the com-

pany" generally, matters had gone far enough in that direction. It was then time to object. If the learned counsel wished to ask any question relative to the contract he was at perfect liberty to do so, The first inquiry he made did relate to the letters, and was not objected to. The last enquiry above quoted does not appear to have any reference either to the letters or the contract or anything done by either party with respect thereto, In fact the only question objected to in this connection was grossly improper. Yet we observe that the learned counsel complain in their printed brief that testimony was offered by them explaining the circumstances under which the letters read in evidence were written, was excluded. This is a mistake, and arose from the fact that the gentlemen confound two questions together, one of which purported to relate to the letters and was not objected to, the other being simply an enquiry whether the plaintiffs had not been "bothering" the defendant generally, and which was objected to and excluded.

We are at a loss to know how the defendant, was or could be injured by the remark made by the court and excepted to. That remark was simply this, "The letters show the circumstances with which they were written sufficiently."

No explanatory circumstances were ruled out. It was the duty of the court to determine on the admissibility of documentary evidence, and what foundation, if any, should have been laid for the introduction thereot. If the court could determine from the inspection of a document that it related to any issue in the case, then it became the duty of the court so to declare, and to let the paper go to the jury with the proper qualifications. If the document appeared to be wholly foreign to the issue the court was required to ascertain the purpose for which it was offered, and admit

or exclude it as the circumstances of the case might require. The law required the court in allowing documents to be read in evidence, to know that the contents thereof, might, in some aspect of the case become relevant, and then to instruct the jury as to the purposes for which such contents might be considered. And this is precisely what the court did in this case. In order to guard against any wrong to the defendant from the letters in question, the court in permitting the letter of Sept. 10th to be read in evidence, said that the letter had no application to the issue, unless it relates to the coal to be delivered in the months of October, November and December. The court added: "you may read this letter to the jury. It has no application unless they believe from the reading of it that it has a subsequent bearing. Of course anything prior to that has nothing to do with this case." (Record p. 131.)

Again with reference to the letter of Sept. 1st, the court told the jury that they were not to "regard anything but what relates to the delivery of coal in the months of October, November and December, 1870. (Record, p. 135.)

The court made the same statements with regard to the letter of Sept. 30, and Dec. 15th. (Record, p. 140.)

The letter of August 26 was not objected to.

It is apparent that the court guarded the introduction of letters with great care and fully informed the jury of the proper limitations which the law placed on the use of them. The remark made by the court and accepted to in the 7th assignment of error, when taken in connection with the instructions given by the court as to the proper use of the letters, was not in the slightest degree objectionable.

POINT NO. 5.

This brings us to the last question upon which any stress is laid by the defendant. The 9th, 10th, 11th, 12th, 13th and 14th errors assigned relate to the measure of damages in the case, while the 4th, 5th and 6th present the same questions in addition to that of the relevancy of the evidence therein referred to.

We have already sufficiently considered the effect of the provision of the contract with respect to liquidated damages. The rulings of the court on this branch of the controversy are fully presented in the demurrer to the pleas, which the defendant sought to carry back to the declaration. Of course the court adhered to its construction of the contract in the instructions it gave the jury, as well as in refusing counter instructions.

But assuming the court to have decided correctly on the main question of construction, and that the plaintiffs were not bound to take liquidated damages when they exercised their right of election, the enquiry remains; how were actual damages to be measured? Did the court adopt the true rule in directing the jury in this respect?

We think the court did adopt the true rule, and gave the jury the proper instructions in this respect.

The court instructed the jury that if the plaintiffs were entitled to recover they should be allowed "the cash value of the coal, at or below Cairo, after deducting the contract price, and the expense of transporting it thither, and making due allowance for the risk and hazard of transportation."

It is first objected that this instruction is erroneous, as it enables the plaintiffs to recover *profits*. (Abstract p. 55)

It is also said that the value of the coal should have been estimated at Grand Tower, the place of delivery, and not "at and below Cairo."

These are the only objections urged against the instructions of the court with respect to the measure of damages and the evidence admitted to establish such damages.

To the first of these objections we reply; that in permitting the plaintiffs to show the market prices of coal at the times when delivery should have been made under the contract, the court did not violate any rule of law with respect to the recovery of profits as legitimate damages. On the contrary the market rates presented the very best standard by which plaintiff's loss, and defendant's liability could have been measured.

There are but two methods by which the extent of the injury inflicted upon the vendee of goods for future delivery by reason of a failure on the part of the vendor to deliver, can be determined.

First, by a resort to the business of the party injured, and an enquiry as to the extent of the trouble, inconvenience, and interruption of said business occasioned by the breach. Precisely how far such an investigation might be carried no one can tell. By the other method the only subject of inquiry is, what were the same articles worth at the time when they should have been delivered, judged by the public market rates at which they were being bought and sold? The value being thus ascertained, the law charges the defaulting vendor with the difference between such market value, and the contract price and credits

him with such items of expense as the purchaser would have been compelled to incur had he in fact recieved the goods. By the former method the extent of damages in a given case would always depend on the circumstances of the plaintiff, his special and peculiar condition as com pared withother men. By the latter rule a general standard is provided, known in advance by all contracting parties, and furnishing a measure ot compensation adapted to most persons injured by such defaults.

In fact the law requires a resort to market value for the very reason that is is much more certain, and much more susceptible of proof than any standard that could be obtained by enquiring into the details of individual business. The rule is in practice, beneficial to the party in in default, for it is generally true that the party injured has suffered incidental losses growing out of the breach of contract, which are excluded from consideration. But the law, whenever possible, adopts such rules as are certain and capable of general application, rather than those, which, more equitable perhaps, in the abstract, are less adapted to practical use.

Whether the plaintiffs purchased the coal for re-sale, or for use, the extent of their loss by the non-receipt of it is properly measured by the market value at the time when it should have been delivered. Had they sold the coal they would have recieved the market price for it. Had they bought they would have been compelled to pay the market price. We are utterly unable to conceive what measure of loss the defendants' counsel would have us resort to, if the standard fixed by market prices was an improper one.

We are told that the plaintiffs should not have been permitted to prove the market prices for the reason that they

do not in their declaration aver that they had entered into a contract with any person whatever at Cairo, Memphis, New Orleans or elsewhere to deliver any portion of the coal. (Brief, p. 53.)

The objection is a strange one. Had we sought to enhance our damages by showing that the coal would have been worth more than the market prices to us, then indeed we would have been required to set out in our pleading the circumstances entitling us to special damages. And had we done so there is not the smallest doubt that defendant's counsel would have at once demurred for that very reason.

As we have already said, it is one great object of the law to provide a rule by which damages in such cases shall be generally measured; a standard which shall be as universally appliable as possible. And it is entirely settled that the rule which adopts market prices as the standard of value between vendor and vendee shall only be departed from under peculiar circumstances. It is not desirable that one plaintiff should be entitled to greater damages than another, when both sue for failures to deliver like articles at the same time; unless some special reason for such discrimination be shown.

Now in this case we are not asking to vary the general rule except in the particular which will be noticed hereafter. We do not claim that we had any special contracts for the re-sale of the coal, by means of which he would have realized prices greater than those which any person whatever could have obtained for the same coal, at and below Cairo. If the objection which the learned counsel makes in this respect be well taken, then it follows that the vendee of chattles under an executory contract cannot even recover the difference between the market price and

the contract price in case of default by the vendor, unless he can prove that he had made particular contracts in advance for re-sale. If he bought for re-sale on open market after receiving the goods himself, then he can recover nothing, no matter how gross the breach nor how high market prices may have run. We are truly at a loss to understand what damages such a vendee would have been entitled to, in case he had purchased for use, and not for re-sale. The learned counsel on the other side will say the damages must be purely nominal, because the purchaser made no special contracts to re-sell.

The fact is we make no averment of any such contract in this case because we do not seek to enhance any damages thereby, and because we are content to measure the value of the coal which should have been delivered to us by the the same standard that was then applied to all who bought or sold the article at the proper place.

While it is true that we do not seek to recover damages by reason of having been prevented from fulfilling any outstanding contracts, by the failure of the defendant to deliver the coal, yet it is also true that we do claim damages in one sense special.

We were not required to set forth in our declaration anything more than a general statement of loss of profits, inasmuch as the only profits we claimed were those which directly grew out of the difference between the contract price and the market price. These profits were such as are always contemplated by parties who make executory contracts for the sale and future delivery of goods. They grow *directly* out of the breach. Mr. Chitty in his work on Pleading says: "Such damages as may be presumed necessarily to result from the breach of the contract, need not be stated with any great degree of particularity in the

declaration. Therefore in an action for not accepting goods sold to the defendant, damages resulting from a fall of the market price may be recovered under a special count with a general allegation of loss and profit, without averring that the value of the goods was less at the time the contract was broken than when it was made." Chitty on Pleading, vol. 1, p. 339.

In this case the declaration does claim for a loss of profits, and specifies that those profits could have been made by a re-sale of the coal.

There is a good deal of confusion in some of the books as to the real meaning of the word profits. It is said by some authorities in a general way, that profits can not be received in an action for not delivering goods. What are we to understand by this? We think it will be found that in almost every case where this broad statement was made the claim to which the term *profits* was applied. consisted of some possibility or probability which the purchaser supposed existed of his realizing more than market value for the goods, by reason of a wise and peculiar use of them. Purchasers have very often supposed and perhaps truly, that they could have made more than market rates by a prudent use or re-investment of the property, and have claimed for the loss of such enhanced prices, as damages. But the law regards such claims as too remote, uncertain and speculative; and it is only under very peculiar circumstances, to which we will refer hereafter, that the injured party is permitted to charge the party in default with any higher valuation of the property than market rates.

While all this is true the broad, general statement that profits can never be allowed as damages, is not sound in law. The whole spirit of the law of compensation contradicts such statements.

It may indeed be said that when, under a contract for the sale and future delivery of chattels, the value of the goods is greater on the day of delivery than the contract price, the difference represents profits. And where the law permits the recovery of such difference in an action by the vendee against the vendor for not delivering, it does clearly allow profits as damages. Therefore it is plain that cases wherein speculative gains that might be realized on some possible use of the property bargained for, were disallowed by the courts, are not to be taken as controlling a case wherein the injured party is content with market values.

We submit that in the objection made by defendant's counsel to the ruling of the court below in this particular, and in the construction which the learned counsel place on authorities cited, they confound the word "*profits*" where used in a proper sense with the same word as expressive of mere speculative and uncertain gains.

In our printed brief we have referred the court to a large number of cases wherein the true meaning of the term now in dispute has been considered and defined.

The other objection taken to the measure of damages adopted by the court below, relates, as we have seen, to the *place* where the value of the property was to be estimated. The court directed the jury to consider the value of the coal " at and below Cairo." The defendant insists that the value should have been fixed by the prices at Grand Tower.

We have already remarked that in one particular, and n one only, the damages claimed by plaintiffs were special. Under an ordinary contract for the future delivery of chat-

tels, if default be made by the vendor, the value of the property is to be estimated at the place of delivery But in some respects, and in this very particular, the contract sued upon is *sui generis*. Unlike most contracts found in the books or in practice, the place where the property was to be enjoyed was fixed by the stipulations of the parties. And the court, following the agreement, held that in determining the value of the coal to the plaintiffs, the jury were to find such value within that region to which the contract limited the plaintiffs in the use of it.

We maintain that the court was right in this construction. It is settled that while the general rule as to the measure of damages is as we have already stated, that rule is subject to an important qualification. Where property is purchased for an avowed purpose known to both parties, and the contract is made with distinct reference to such special purpose, the law will hold the defaulting party liable for any special damages which may result from such a breach as defeats the very end of the agreement. This is particularly true with respect to the sale of goods for the purpose of re-sale in a particular market. The law will not presume that the parties contracted with a view to any particular market, and will not, in the first instance, hold the defaulting vendor liable for special damages. But when it appears that both parties contracted with a direct reference to a particular market, that the purchase was made for that very purpose, and this was known to the seller when the bargain was made, there the law resorts to the very standard of value which the parties had in view, and applies it as between them.

The coal in controversy was purchased for a specific purpose known to both parties when the contract was made. If the doctrine contended for by defendant's coun-

sel be sound, the plaintiffs could not prove the value of the coal for re-sale anywhere. Not below Cairo, for, as the learned counsel say, that was not the place of delivery. Not at Grand Tower, for, by the terms of the contract they were not permitted to sell there. They are debarred from showing the selling value of coal at Grand Tower by the contract, and elsewhere by the law. In fact the objections of the learned counsel fully vindicate the rule that the direct profits contemplated by both parties in making a contract for the sale of goods, may properly be allowed as damages for the breach of such contract.

The doctrine held by the Court of Exchequer, in Hadley vs. Baxendale, 26 E. L. & E. Reports, p. 398, is the true one, and indeed the only one under which a real remedy could be afforded in a case like the present.

We also cite a number of cases on this point in addition to those we have cited in our brief.

Bridge vs Warren, 1 Starkie, 504.

Mossrose vs. New York Shot Co., 40 N. Y. 422.

Bell vs. Cunningham, 3 Peters, 84.

O'Connor vs. Foster, 10 Watts, 418,

Hargrous vs. Ablon, 5 Hill, 474.

Sedgwick on the Measure of Damages, second edition, page 277.

Nothing can be more certain than the fact that the defendant, as well as the plaintiffs, had in ~~distant~~ view the markets of the Mississippi below Cairo, and the manner in which those markets would be effected by the stages of the Ohio river. We might therefore well insist that the value of the coal should be properly measured by the prices which it would have produced at those points where both

parties intended it should be sold. But the propriety of resorting to such measure of value is made still more certain by the fact that the sale of the coal "at and below Cairo," was not merely a matter of knowledge and intent in the parties, but a matter of positive stipulation. We might properly claim the right to apply to the property contracted for, the standard of value which both parties knew and intended should be applied to it, in carrying out the contract; but our right to resort to this measurement is established by a much stronger reason in view of the very limitations which the agreement places on the use of the property by the plaintiffs.

We thus find that the instructions of the court with respect to the place where the value of the coal was to be estimated, were in strict conformity with the rule of law respecting property sold and contracted to be delivered for re-sale in a particular market. But whatever the instructions of the court might have been, no other measure of value was possible under the evidence. Granting that the market price of coal at Grand Tower were to be taken as the true standard, provided there was a market at that place, yet, in the absence of such a market, it was not possible for the jury to resort thereto. A failure to apply the market value at a place where, practically, there was no market, did not, and could not, injure the defendant. Neither by the instructions of the court nor the action of the jury in failing to measure the coal by Grand Tower prices, could possibly have worked any injury to the defendant.

Had it been shown by the evidence that on the default of the defendant, the plaintiffs could still have procured a sufficient supply of coal at Grand Tower, and thereby

have realized their profits, there might have been more show of reason for the position taken by the defendant. But the very nature of the contract prevented plaintiffs from so supplying themselves, even if there had been no other insuperable difficulty. Plaintiffs were forced to keep their barges ready to receive their quotas for each month as it became due. In order to seek a supply elsewhere they would have been compelled to withdraw their fleet, and thereby to release the defendant from all obligation to deliver subsequently accruing quotas. Ordinarily the vendee of chattels under on executory contract, may, on default by the vendor seek a supply elsewere. And if he can obtain such a supply he is bound to do so, and thus prevent any unneccessary increase of damages But in this case the contract was still in force; the first year had not expired; and plaintiffs were required, in order to preserve their accruing rights, to keep the means idle by which they might otherwise have protected themselves. That is, provided they could have obtained the coal.

But the evidence unmistakably shows that there was no coal except that owned by defendant at Grand Tower, or any where within reach. Mr. St. John testifies that plaintiffs could have supplied themselves with this coal only from the Grand Tower Company. That there was no other mine at Mt. Carbon where they could have supplied themselves. That that quality of coal was not to be had at that time. (Record, p. 32.)

Mr. Phillips says: "This quantity of coal could not have been bought within 100 miles of Grand Tower at that time; that there were no other mines at Grand Tower than the mines of the defendant; that the defendant makes the only market there is for coal. (Record p.

35.) He also says there were no coal markets, but retail markets at Cairo between Grand Tower and Memphis. (Record p. 34.)

It is true some small quantities of coal were sold by the defendant at Grand Tower, but nearly all of this was delivered on old contracts with the Memphis Packet Company. Mr. Driggs says this company took almost half of what was sold. Coal was also delivered to the St. Louis furnace, and he, Driggs, thinks the price to them was $3 50 per ton, and the company might have delivered it to some small purchasers at places near by at that price. (Record p. 151.) There was no coal sold at Grand Tower other than the coal sold by defendant. The contracts with the packet company and the St. Louis furnaces were in force on the first day of October, having been made on the first day of January. (Record 152.)

Mr. Pratt says he thinks they sold small quantities outside of what they sold the boats and the furnaces at St. Louis. (Record 122.)

It thus appears there was no real market at Grand Tower during the time when the coal in controversy ought to have been delivered. Coal was indeed delivered by defendant under old contracts, and small quantities in addition, sold at such rates as the defendant pleased to ask. Mr. Driggs says three quarters of the coal was under contract, and he could only raise the price as to a small proportion. He therefore did not raise the price, although he presumes he could have got more than $4, if he thought it policy to put up the price. He was instructed by Mr. Oliphant's letter to put up the price to $4 50. (Record 153.)

We are asked by defendant's counsel why it was that "plaintiffs did not apply for and offer to purchase coal outside the contract, after they failed to receive it under the contract?" (Brief p. 57.

Plaintiffs are thus called upon to explain why they did not ask the defendant to make a new contract, while in the very act of breaking the old one! Can this be required?

We submit that no true principle of law would compel plaintiffs to seek another and different agreement, even if they had full assurance that the coal could be procured thereby. The law will not require a party to whose injury a contract has been wantonly broken, to make overtures for a new bargain with the very party in default, particularly when the breach had been deliberate and willful. And this is especially true when the only purpose for which a new contract could be entered upon, would be that of reducing the damages for which the party in default must be ultimately liable.

However this may be in general, the defendant was not required to make advances under the circumstances of this case.

On the 11th day of October Mr. Oliphant said that "when the barges were loaded they would know whether they would get coal or not." (Record 108.)

On the 31st day of October he said the same to Mr. St. John. (Record 27.)

On the 30th day of September, before any part of the coal was due, he wrote to his superintendent as follows: "Phillips & St. John's account you may leave, though I see but little to be gained by delay Contract or no contract, they will get no more coal from us." (Record 138.)

And now the defendant's counsel tell us that before claiming damages for a breach of the contract plaintiffs should have applied to the defendant for coal on *some* terms.

We ought to have formally petitioned for that which belonged to us already, but was denied us in spite of our rights; for perchance the defendant might have let us have coal at such prices as would have enabled us to realize some profits and thereby reduce the damages for which defendant was deliberately rendering itself liable.

As an illustration of the good faith with which this defense is set up, we refer to the sixth error assigned. (Abstract p. 41.) On the trial below the plaintiffs desired to show that defendant refused to let plaintiffs have even enough coal to get one of their tow boats out of danger. Defendant, by its counsel objected to this enquiry on the ground that it had nothing to do with the contract. (Record p. 143.)

Now the same learned gentlemen says we should have shown that we tried to get coal outside the contract after we had failed to get it inside the same.

We say that the plaintiffs were not required to show the market value of the coal at Grand Tower, even had there been a regular market there; for the reason that the parties intended and stipulated for the use of the property elsewhere. Indeed we may say that for all the purposes of enjoyment, Grand Tower was not the place of delivery of the coal at all. It was to be given to the plaintiffs there but only in transitu under the contract.

But whatever the rule may be, as to the place where the coal was to be valued according to market rates, there was no market at Grand Tower. That can only be regarded as a market where rates are controlled by fair competition as between both buyers and sellers. The rates established

at such places are only valuable because of the presumption that prices there find their true level, under the free operation of natural laws.

But rates fixed by ~~the~~ One dealer only can never be very reliable as measures of value. This is more particularly true when that dealer makes the rates by his own arbitrary action, and then offers them in evidence in his own behalf. This case illustrates very clearly the truth of our position that one dealer can not make a market. It happens that in this very case the defendant contemplated a breach of the contract. It became important then that the price of of coal should not advance very much at Grand Tower if the value under the contract must be taken at that point. There was nothing to prevent the defendant from establishing its own measure of damages, and making evidence for itself, by which to reduce its liability. It was only selling in small quantities, outside of unexpired contracts, and could therefore very conveniently fix prices where it pleased. But we submit the plaintiffs are not bound by values so fixed.

There was no public market at Grand Tower for another reason. That can only be regard as a public market where the privilege of buying and selling is open to all who come. The plaintiffs were excluded from this so-called market. The defendant refused to let them have a small quantity to save them from the loss of a tow-boat. It was declared that they should have no coal, "contract or no contract." Therefore we say that there was and could be no market at Grand Tower while the largest dealers in the trade were excluded therefrom.

It is fully settled, that when it becomes important to fix the value of any article at a particular place, and there is no market there, a resort may be had to rates ruling else-

where, and such rates, with the proper allowances for cost of transportation, etc., are taken as evidence of real value at the proper place. In our printed brief we have referred to cases which fully establish this proposition.

Under this rule the value of the coal in qnestion, "at and below Cairo," afforded a means of ascertaining its value at Grand Tower. It was worth at the latter place, just as much as at the former, less the cost of transportation and the risks incidental to the business. There was a fixed relation between the value of the article at the two places, and one was capable of being proved by the other. Independent of the stipulation of the contract therefore, which fully justified the court in directing the jury to find the value of the coal at the place where the pluintiffs were bound to use it—that instruction was proper on another distinct ground. Because there was no market at Grand Tower whose rates were binding on the plaintiffs, particularly as those rates were fixed by the defendant alone, and that too after the *lis mota* arose. And there being no such market the rates ruling at and below Cairo, with the proper allowances for transportation, risk, etc., afforded a true measure of what the coal would have been really worth, even at Grand Tower, had it been delivered to the plaintiffs.

We recapitulate the reasons why the instructions of the court were correct with respect to the measure of damages:

1st. Because the parties when they made the contract contemplated the use of the coal by the plaintiffs for the purpose of re-sale in a particular market.

2d. Because the parties not only contemplated and intended the coal to be re-sold at any place below Cairo, but actually prohibited its re-sale elsewhere. So that plaintiffs

must either show what they could have sold for below Cairo or not at all; as they could not sell above that point without committing a breach of their own covenant.

3d. Because there was no supply of coal at Grand Tower other than that owned and controlled by defendant, and the law did not require the plaintiffs to ask the defendant to make a new contract while engaged in breaking an old one.

4th. Because there was no market at Grand Tower where the plaintiffs could have obtained the requisite quantity of coal, and plaintiffs could not withdraw their barges for the purpose of seeking a supply, without discharging the defendant from accruing obligations.

5th. Because there being but one coal dealer at Grand Tower, the rates fixed by that dealer alone are not market prices within the meaning of the law.

6th. Because the defendant could not make evidence for itself of market values; particularly after the controversy commenced with plaintiffs.

7th. Because that could not be a public market at Grand Tower, which was not open to all purchasers, the plaintiffs being excluded therefrom.

8th. Because the rates "at and below Cairo," after the proper allowances were made for transportation, etc., afforded a true measure of the value of the coal at Grand Tower.

POINT NO. 6.

From the whole record the court can see that the judgment below was eminently just and right. It is seldom too that a more cold-blooded and deliberate breach of faith has been exposed in a court of justice than that which is here shown on the part of the defendant. A much larger verdict would have been justified by the evidence, but for the fact that the damages were laid too low by mere mistake.

Even if some parts of the evidence which went to the jury were irrelevant, or if some of the rulings of the court were erroneous, yet no one was or could be wronged thereby. The verdict was right upon the evidence, and there is not the smallest reason to believe that it could be changed by the rejection of any evidence objected to by the defendant. It should only be for very grave and very palpable errors that a judgment should be reversed wherein nothing but justice has been done.

We have cited an ample number of authorities in one brief already filed, and beg to refer the court thereto.

HAY, GREENE & LITTLER,
GREEN & GILBERT.
Of Counsel for Defendants in Error.